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Comment

EXTRATERRITORIAL EFFECT OF THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT OF 1933

I. INTRODUCTION

With the growth of the multinational corporation¹ and the increased foreign activity in American securities,² a "revolutionary trend toward the internationalization of the securities markets" has occurred.³ As a result, both the securities bar⁴ and the courts⁵ have been compelled with increasing regularity to determine the extraterritorial effect⁶ of various provisions of

1. See Bodolus, *The Internationalization of the Securities Markets*, 29 BUS. LAW. 107, 107 (March 1974)(Special Issue).

2. Foreign purchases and sales of American securities increased from \$7.8 billion in 1965 to \$30.8 billion for the period of January to November 1976. See Loomis & Grant, *The U.S. Securities And Exchange Commission, Financial Institutions Outside The U.S. And Extraterritorial Application Of The U.S. Securities Laws*, 1 J. COMP. CORP. L. & SEC. REG. 3, 24 n.1 (1978) (citations omitted).

3. Bodolus, *supra* note 1, at 113. See also Scherk v. Alberto-Culver Co., 417 U.S. 506, 528 (1974) (Douglas, J., dissenting) (huge foreign investments being made in United States companies). This trend toward internationalization is evidenced by the increased literature regarding the legal ramifications of the marketing of securities in foreign countries. See, e.g., Schaafsma, *Netherlands Securities Laws*, 33 BUS. LAW. 101 (1977); Thorpe, *The Sale of U.S. Securities in Japan*, 29 BUS. LAW. 411 (1974); Project, *International Securities Project*, 30 BUS. LAW. 585 (1975).

4. See, e.g., Hopkins, *Problems of Trading in Domestic and Foreign Securities*, in FIRST ANNUAL INSTITUTE ON SECURITIES REGULATION 308 (1970); Williams, *Trading In the United States In Foreign Securities Distributed Outside The United States Without Registration Under The Securities Act of 1933*, in SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION 327 (1975); Goldman & Magrino, *Some Foreign Aspects Of Securities Regulation: Towards A Reevaluation Of Section 30(b) Of The Securities Exchange Act of 1934*, 55 VA. L. REV. 1015 (1969); Karmel, *The Extraterritorial Application Of The Federal Securities Code*, 7 CONN. L. REV. 669 (1975); Loomis & Grant, *supra* note 2. Student work on the subject of the extraterritorial application of the securities laws has also been published with increasing frequency. See, e.g., Note, *Extraterritorial Application of The Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94 (1969) [hereinafter cited as *Extraterritorial Application*]; Note, *American Adjudication Of Transnational Securities Fraud*, 89 HARV. L. REV. 553 (1976) [hereinafter cited as *Transnational Securities Fraud*]; Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363 (1973) [hereinafter cited as *Reach of Rule 10b-5*].

5. See *United States v. Cook*, 573 F.2d 281 (5th Cir.), cert. denied, 99 S. Ct. 119 (1978). For a complete discussion of the major cases in the area of the extraterritorial application of the securities laws, see notes 83-177 and accompanying text *infra*.

6. This comment will focus on the issue of subject matter jurisdiction. It is therefore assumed that a plaintiff seeking to adjudicate a claim in a United States court has been able to obtain personal jurisdiction over the defendant. For an examination of the often complex issue of personal jurisdiction in transnational securities transactions, see *Garner v. Enright*, 71 F.R.D. 656, 659-61 (E.D.N.Y. 1976); *Wagman v. Astle*, 380 F. Supp. 497, 499-502 (S.D.N.Y. 1974); *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14, 24-27 (E.D. Pa. 1972); Loomis & Grant, *supra* note 2, at 13-15. See also Karmel, *supra* note 4, at 697-701. Most courts have determined that the inquiry with respect to personal jurisdiction under the securities laws is one of due process. See *Sun First Nat'l Bank of Orlando v. Miller*, 77 F.R.D. 430, 433-34 (S.D.N.Y. 1978).

the United States securities laws.⁷ While most of the recent discussion has focused upon the Securities Exchange Act of 1934 (1934 Act),⁸ the scope of the registration requirements of the Securities Act of 1933 (1933 Act)⁹ presents important extraterritorial issues. Although the Securities and Exchange Commission (SEC) has officially maintained that it will not apply the registration requirements of the 1933 Act to domestic securities offered in foreign countries *exclusively* to foreign investors,¹⁰ this position is subject to change¹¹ since it is not premised upon a conclusion that the SEC lacks

7. There are eight major statutes involving federal regulation of the securities industry. See 15 U.S.C. §§ 77a-77aa (1976) (Securities Act of 1933); *id.* §§ 77bb-77mm (Corporation of Foreign Bondholders Act of 1933); *id.* §§ 77aaa-77bbbb (Trust Indenture Act of 1939); *id.* §§ 78a-78kk (Securities Exchange Act of 1934); *id.* §§ 78aaa-78lll (Securities Investor Protection Act of 1970); *id.* §§ 79 to 79z-6 (Public Utility Holding Company Act of 1935); *id.* §§ 80a-1 to 80a-52 (Investment Company Act of 1940); *id.* §§ 80b-1 to 80b-21 (Investment Advisers Act of 1940). This comment will focus primarily on the Securities Act of 1933 and, where appropriate, the Securities Exchange Act of 1934. Nevertheless, the basic principles discussed herein may be applied in an analysis of any of the other federal statutes.

8. *Id.* §§ 78a-78kk. See, e.g., Goldman & Magrino, *supra* note 4; Karmel, *supra* note 4; Loomis & Grant, *supra* note 2; Reach of Rule 10b-5, *supra* note 4. See also *Extraterritorial Application*, *supra* note 4; *Transnational Securities Fraud*, *supra* note 4; 10 COLUM. J. TRANSNAT'L L. 150 (1971).

9. 15 U.S.C. §§ 77e (1976). The registration requirements are detailed in § 5 of the 1933 Act, which provides in pertinent part:

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments or transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order . . .

Id.

10. SEC Securities Act Release No. 4708, 29 Fed. Reg. 9,828, reprinted in 1 FED. SEC. L. REP. (CCH) ¶¶ 1361-1363 (July 9, 1964) [hereinafter cited as Release 4708]. For a detailed discussion of the position taken by the SEC regarding the registration requirements for foreign offerings, see notes 52-82 and accompanying text *infra*.

11. The SEC has changed its position in this area at least once. Initially, the SEC took the position that distributions from the United States into foreign countries did not have to be registered because the issues constituted private offerings within the meaning of the statute's private offering exemption. See ALI FED. SEC. CODE § 1604, Comment c(4), at 167 (Tent. Draft No. 3, 1974). Although the statute was not amended, the SEC altered its position and now maintains that while such distributions still need not be registered, it is only because the SEC

jurisdiction over such offerings.¹² In addition, in the absence of rules or regulations adopting the SEC's position, it is questionable whether private litigants are bound by that agency's interpretation of the registration requirements.¹³ Moreover, the recent adoption of the Federal Securities

has decided as a matter of "agency grace" or prosecutorial discretion that registration is not required. *Id.* The significance of this change in position is exemplified by the SEC's action in *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973). In *United Financial Group*, the SEC argued that the registration provisions of the 1933 Act apply whenever a party uses any facility of interstate commerce. *Id.* at 357. See also R. JENNINGS & H. MARSH, SECURITIES REGULATION 1244 (4th ed. 1977) [hereinafter cited as JENNINGS & MARSH].

12. Release 4708, *supra* note 10, ¶ 1361, at 2123-24. The SEC noted in its release:

Since "interstate commerce" is defined in Section 2(7) of the Act to include "trade or commerce in securities or any transportation or communication relating thereto . . . between any foreign country and any State, Territory, or the District of Columbia," this might be construed to encompass virtually any offering of securities made by a United States corporation to foreign investors.

Id. at 2124 (emphasis added).

An additional problem with the current position of the SEC in this area is that it is unclear whether its policy of not requiring registration extends to secondary offerings of securities. See *id.* ¶¶ 1361-1363, at 2123-25. Moreover, it is unclear whether an American issuer may rely on Release 4708 when it conducts a "private placement" and the private placement purchasers purchase with a view toward distribution in a foreign country. *Id.*

13. See JENNINGS & MARSH, *supra* note 11, at 1244 n.14. Section 19(a) of the 1933 Act provides in pertinent part:

The Commission shall have the authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter. . . . No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation . . .

15 U.S.C. § 77s(a) (1976). At least one court has held that releases in stop-order proceedings under § 8(d) of the 1933 Act, *id.* § 77h(d), "do not have the effect of rules and regulations of the SEC" adopted pursuant to the SEC's § 19 power. *DiJulio v. Digicon, Inc.*, 339 F. Supp. 1284, 1290 (D. Md. 1972). The United States Court of Appeals for the Second Circuit, however, appears to take the position that a formal adoption of a rule is not necessary in order for the defendant to invoke the protection of the "good faith" reliance test of § 19. See *Byrnes v. Faulkner, Dawkins & Sullivan*, 550 F.2d 1303 (2d Cir. 1977). In *Byrnes*, the Second Circuit held that reliance on a securities act release which consisted of an opinion of the SEC general counsel did not satisfy the "good faith" reliance test of § 19, noting that the appellants' reliance "was an elaborately reasoned interpretation directly contrary to literal language." *Id.* at 1313. The Second Circuit concluded that "section 19 is not applicable unless there has been conformity with an SEC rule, regulation, or at least a 'general understanding . . . regularly given effect by the Commission's staff in dealing with lawyers who specialize in SEC matters' or 'an article of faith among lawyers specializing in the securities field.'" *Id.*, quoting *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1293, 1294 (2d Cir. 1973). See also *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir.) (dictum), *cert. denied*, 423 U.S. 1018 (1975).

Such an interpretation of § 19 would appear to contravene a literal reading of the statute—the SEC is authorized to promulgate "rules and regulations." See 15 U.S.C. § 77s(a) (1976). For the pertinent text of § 19, See note 13 *supra*. Since the power of an administrative agency is derived from its governing statute, arguably a private litigant could contend that the SEC lacks the authority to alter substantive rights by merely adopting a general policy or issuing an informal interpretive release. Cf. *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) (question of power of CAB is determined not by what the Board thinks it should do, but rather by what Congress has said it can do). Moreover, if Congress intended that the registration requirements are not to be applied extraterritorially, the SEC has no power to alter that determination. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976) (rulemaking power granted to an administrative agency is not the power to make law). See also JENNINGS & MARSH, *supra* note 11, at 1244 n.14. It is probable, however, that reliance on SEC releases will insulate the party from injunctive action by that agency. See *SEC v. Harwyn Indus. Corp.*, 326 F. Supp. 943, 955-58 (S.D.N.Y. 1971).

Code (Code) by the American Law Institute makes an examination of the extraterritoriality issues particularly appropriate.¹⁴

This comment will discuss the pertinent sections of the 1933 Act and provide a brief review of the interpretive tools employed by courts to determine the extraterritorial effect of securities legislation. Part III will present a detailed examination of the SEC's position regarding foreign offerings. Following a discussion of the major judicial decisions in this area of the law in Part IV, Part V will provide a brief review of the position taken by the American Law Institute in the Federal Securities Code. The article will conclude with a synthesization of the information in an attempt to identify the scope of the registration requirements under the 1933 Act.

II. STATUTORY EXAMINATION

A. The 1933 Act

In enacting the 1933 Act, Congress intended to facilitate investor decisionmaking through the development of a full-scale disclosure system.¹⁵ The statutory scheme incorporates two principal substantive prohibitions. First, the statute prohibits the sale or offering for sale of securities without adherence to a mandated presale registration and disclosure process.¹⁶ Second, the statute proscribes fraudulent conduct in connection with the offer or sale of any security.¹⁷ Although exemptions exist with respect to the

14. See ALI FED. SEC. CODE (Proposed Official Draft March 1978). For a discussion of the Federal Securities Code, see notes 178-207 and accompanying text *infra*. The American Law Institute approved the Federal Securities Code Project in December 1968. See Loss, *The American Law Institute's Federal Securities Code Project*, 25 BUS. LAW. 27 (1969). This project was primarily an attempt to reform and modify the existing securities statutes and accompanying administrative policies. See Titus, *Unification, Modernization And A Modicum Of Predictability: An Introduction To The Proposed Federal Securities Code*, 7 CONN. L. REV. 658, 658-59 (1975). According to Professor Loss, who authored the introduction to the proposed official draft, the three principal aims of the Code are

1) simplification of an inevitably complex body of law in light of some four decades of administration and litigation; 2) elimination (so far as possible) of duplicate regulation; and 3) reexamination of the entire scheme of investor protection with a view toward increasing its efficiency and doing so, in President Roosevelt's words, "with the least possible interference to honest business."

ALI FED. SEC. CODE at XV (Proposed Official Draft March 1978).

15. See *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953).

16. See 15 U.S.C. §§ 77a-77h, 77j (1976). Many commentators argue that the costs to issuers of compliance with the registration and disclosure procedures inhibits the raising of capital. See Alberg & Lybecker, *New SEC Rules 146 and 147: The Nonpublic And Intrastate Offering Exemptions From Registration For The Sale Of Securities*, 74 COLUM. L. REV. 622, 622 (1974). This may especially be true in light of the express provision in the 1933 Act that "[n]othing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person." 15 U.S.C. § 77r (1976). Issuers must therefore comply with state as well as federal requirements.

17. See 15 U.S.C. § 77q (1976). The antifraud provisions of the 1933 Act are very similar to those in the 1934 Act. Compare *id.* (1933 Act) with *id.* § 78j (1934 Act). See also 17 C.F.R. § 240.10b-5 (1978).

registration requirements,¹⁸ the antifraud provisions apply regardless of whether the offering has been registered.¹⁹

The primary requirements of the presale registration and disclosure process are codified in section 5,²⁰ which specifically provides that a registration statement be in effect and a prospectus be delivered prior to the public sale of any security.²¹ Furthermore, the statute delegates broad regulatory powers to the SEC that authorize the agency to define the specific information required in registration statements²² and to formulate other necessary

18. See 15 U.S.C. §§ 77c, 77d (1976). Exemptions to the registration and prospectus delivery requirements are provided for "certain types of . . . securities transactions where there is no practical need for . . . [the 1933 Act's] application or where the public benefits are too remote." H.R. REP. NO. 85, 73d Cong., 2d Sess. 5 (1933). Unless a transaction falls within a stated exemption, registration and the delivery of a prospectus are required. See *SEC v. Mono-Kearsarge Consol. Mining Co.*, 167 F. Supp. 248, 252 (D. Utah 1958). Moreover, the statutory exemptions are narrowly construed. See *United States v. Wolfson*, 269 F. Supp. 621, 626 (S.D.N.Y. 1967). In addition, it is clear that the person claiming the exemption has the burden of proving that the transaction falls within the statutory language. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953).

While § 3 exempts specified securities from the registration requirements of the 1933 Act, see 15 U.S.C. § 77c (1976), § 4 provides that certain *transactions* are exempt from the provisions of § 5. See *id.* § 77d. The effect of § 4 is to provide that only transactions conducted by issuers, underwriters, and dealers are subject to the registration and prospectus delivery requirements of the 1933 Act. See *id.* § 77d(1)-(4). Furthermore, issuers are exempt from the requirements of § 5 if they engage in a transaction "not involving any public offering." *Id.* § 77d(2). Moreover, if a dealer meets the time requirements of § 4, he may also be exempt from the requirements of § 5. *Id.* § 77d(3) (A)-(C). Unlike the dealer or issuer, the underwriter generally cannot take advantage of an exemption. See R. HERWITZ, *CORPORATIONS COURSE GAME PLAN* 2.8 (1975). In addition, the statutory definition of an underwriter is quite broad. See 15 U.S.C. § 77b(11). Courts have consistently referred to the broad statutory language in holding that an underwriter includes anyone who participates, directly or indirectly, in a distribution of securities to the public. See *SEC v. Culpepper*, 270 F.2d 241, 246 (2d Cir. 1959) (broker purchasing from other brokers was an underwriter because of close association with people in control group). See also *SEC v. North Am. Research & Dev. Corp.*, 280 F. Supp. 106, 122 (S.D.N.Y. 1968), *aff'd in part and rev'd in part*, 424 F.2d 63 (2d Cir. 1970) (mere fact that defendants were not in privity of contract with issuer does not alter their status as underwriters).

19. *SEC v. Cal-Am Corp.*, 1 FED. SEC. L. REP. (CCH) ¶ 96,347 (C.D. Cal. 1978). See also SEC Securities Act Release No. 5226, 37 Fed. Reg. 600, *reprinted in* 1 FED. SEC. L. REP. (CCH) ¶ 2785 (Jan. 10, 1972).

20. 15 U.S.C. § 77e (1976). See Loomis & Grant, *supra* note 2, at 6.

21. 15 U.S.C. § 77e (1976). For the text of § 5, see note 9 *supra*. The prospectus may accompany the security, 15 U.S.C. § 77e(b)(2) (1976). In addition to regulating the sale of the security, the statute also regulates the extent to which the securities may be offered for sale prior to the effective date of a registration statement. *Id.* §§ 77e(b)(1), (c). No offers or sales may be made prior to the filing of the registration statement. *Id.* § 77e(c). After the registration statement has been filed, the statute permits oral offers but limits written offers to certain specified forms. *Id.* §§ 77e(b)(1), 77j(b). Notwithstanding the allowance of certain offers following the filing of the registration statement, no sales may be consummated until after the registration statement has become effective. *Id.* § 77e(a).

22. See 15 U.S.C. §§ 77g, 77j(c), 77s (1976). Typical of this broad delegation is the statutory mandate that "[a]ny prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors." *Id.* § 77j(c).

directives in order to implement the disclosure process of the 1933 Act.²³ In addition, in order to assure compliance with the disclosure procedure and other statutory requirements, the 1933 Act provides extensive criminal²⁴ and civil liabilities²⁵ for a breach of its provisions.²⁶ For example, failure to register an otherwise registerable offering subjects the seller of the unregistered security to an action for rescission by his purchaser even if the

23. See *id.* § 77s(a). For the pertinent text of this provision, see note 13 *supra*. The SEC has used its rulemaking authority to modify or expand the statutory mandate in several areas. One example is with respect to the effective date of a registration statement. The statute provides that the registration statement becomes effective 20 days after its filing, or after the filing of an amendment thereunder, unless the SEC prescribes an earlier date. 15 U.S.C. § 77h(a) (1976). The SEC has adopted a rule in which it describes the circumstances under which it will "accelerate" the effective date of the registration statement. See 17 C.F.R. § 230.460 (1978). Both the statute and the SEC rules and regulations must therefore be examined in order to determine the complete requirements regarding the registration and disclosure process.

24. 15 U.S.C. § 77x (1976). Specifically, a person convicted of a willful violation of the Act may be "fined not more than \$10,000 or imprisoned not more than five years or both." *Id.*

25. Even if the offering is registered, extensive civil liability provisions exist for violations of other substantive provisions of the 1933 Act. For example, if the prospectus or oral communication employed in the sale of a security is false or misleading as to a material fact, the purchaser may maintain a damage or rescission action. *Id.* § 77l(2). If the defendant can prove that "he did not know and in the exercise of reasonable care could not have known" that the communication was false or misleading, he may escape liability. *Id.* Moreover, the purchaser cannot know that the statement was false or misleading. *Id.*

Regardless of whether a purchaser is in privity of contract with a defendant, the statute confers on the purchaser a cause of action for damages against numerous participants in the distribution scheme in the event that the filed registration statement was false or misleading. *Id.* § 77k. The purchaser may sue every person who signed the registration statement, every director of the issuer, every person about to become a director of the issuer and who was named, with that person's consent, in the registration statement, every "expert" who "certified" the registration statement, and every "underwriter." *Id.* § 77k(a).

The statute, however, provides a number of defenses. If the defendants can prove that the purchaser knew of the false or misleading statement, they may escape liability. *Id.* In addition, if the purchaser bought the security after the issuer had made available to its security holders an earnings statement covering a period of at least 12 months after the registration statement became effective, the purchaser must prove that he relied upon the registration statement in making his securities purchase. *Id.* Nevertheless, the purchaser need not prove that he read the registration statement. *Id.* Finally, the statute also recognizes a number of "due diligence" defenses. *Id.* § 77k(b)-(d). See also *Escott v. BarChris Constr. Corp.*, 238 F. Supp. 643 (S.D.N.Y. 1968).

Liability under § 11 is joint and several. 15 U.S.C. § 77k(f) (1976). Moreover, the measure of damages depends upon the time at which the plaintiff disposes of the security, with the maximum recovery being limited to the amount paid for the security. *Id.* § 77k(e).

In addition to the aforementioned liabilities, a purchaser of securities has other remedies under the 1933 Act. If the seller engages in fraudulent conduct with respect to the offer or sale of a security, the buyer may recover under the general antifraud provisions regardless of whether the statute required registration of the offering. *Id.* § 77q. See note 19 and accompanying text *supra*. Moreover, the buyer may recover from anyone who "controls" a person who is liable to the buyer under § 11 or § 12 of the 1933 Act. 15 U.S.C. § 77o (1976). Finally, the statute provides that the "rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that exist at law or in equity." *Id.* § 77p.

26. The SEC may also pursue injunctive relief or seek a writ of mandamus directing a person to comply with the statute or an SEC order promulgated pursuant to the agency's statutory authority. 15 U.S.C. § 77t (1976).

seller's actions were not intended as a deliberate attempt to circumvent the statutory requirements.²⁷

With respect to the extraterritorial scope of the disclosure and registration requirements, the 1933 Act is not clear. Section 22 provides in pertinent part:

The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission . . . concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.²⁸

Although it is clear from section 22 that a system of concurrent jurisdiction is established, this provision provides little insight into the extraterritorial reach of the 1933 Act. Similarly, an examination of the substantive provisions of section 5 furnishes no further guidance on the extraterritoriality issue. According to the statutory language, section 5 applies where the sale of securities takes place in "interstate commerce."²⁹ The statute defines interstate commerce as "trade or commerce in securities or any transportation or communication relating thereto among . . . or between any foreign country and any State, Territory, or the District of Columbia."³⁰ This definition of interstate commerce appears to confer subject matter jurisdiction over most, if not all, transnational securities transactions. In examining the extraterritorial reach of other statutes which define interstate commerce in a similar fashion, however, most courts and commentators appear to have concluded that the statutory definition is not dispositive.³¹

B. Interpretive Tools

Whether a statute unclear on its face is to be applied extraterritorially depends upon principles of statutory construction and international law.³²

27. *Id.* § 77l(1). The purchaser may recover damages if he no longer owns the security. *Id.* Of course, if the offering is exempt from the registration requirements of § 5, the defendant may escape liability. For a discussion of the applicable exemptions, see note 18 and accompanying text *supra*.

28. 15 U.S.C. § 77v (1976).

29. For the text of § 5, see note 9 *supra*.

30. 15 U.S.C. § 77b(7) (1976) (emphasis added). Similar definitions of interstate commerce are provided in the 1934 Act, *id.* § 78c(a)(17); the Investment Company Act of 1940, *id.* § 80a-2(a)(18); and the Investment Advisers Act of 1940, *id.* § 80b-2(a)(10).

31. See, e.g., *United States v. Cook*, 573 F.2d 281 (5th Cir.), *cert. denied*, 99 S.Ct. 119 (1978) (no discussion of statutory definition); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977) (no discussion of statutory definition); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (court conducted detailed inquiry into congressional intent and decided case without reliance on interstate commerce definition); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (congressional intent dispositive, not any one statutory provision). See also Karmel, *supra* note 4, at 671-73; Loomis & Grant, *supra* note 2, at 6. *But cf.* *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977) (court relied in part on interstate commerce definition as evidence of congressional intent).

32. See Tomlinson, *Federal Regulation of Secondary Trading in Foreign Securities*, 32 BUS. LAW. 463, 495 n.150 (1977).

While the general rule of statutory construction is that all legislation is *prima facie* territorial,³³ Congress has the power to provide for extraterritorial application.³⁴ Although Congress need not follow principles of international law when it provides that a statute should be given extraterritorial effect,³⁵ most courts presume that it does follow such principles absent a clear indication to the contrary.³⁶ While it is generally recognized that the securities laws do not evidence such a contrary intent,³⁷ the extent to which Congress intended to incorporate international law principles into the application of the securities laws is not clear.³⁸ An examination of the major principles of international law is therefore appropriate.

American courts generally accept the Restatement (Second) of Foreign Relations Law of the United States (Restatement)³⁹ as the appropriate summary of international law principles.⁴⁰ Although the Restatement provides that a state may have jurisdiction to prescribe rules of law in numerous circumstances,⁴¹ three such situations appear most appropriate to an analysis of transnational securities transactions. The first, and perhaps broadest basis for jurisdiction, is grounded solely upon the nationality of the defendant. According to the Restatement, "[a] state has jurisdiction to prescribe a rule of law . . . attaching legal consequences to conduct of a national of the state

33. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

34. See *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *modified*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 906 (1969). In *Schoenbaum*, the Second Circuit stated "that Congress intended the . . . [1934] Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities." 405 F.2d at 206.

35. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945).

36. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (clear expression of congressional intent required in order to apply United States labor laws to foreign-flag vessels); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (act of Congress should not be construed so as to violate "law of nations" if other construction is possible).

37. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). In *Leasco*, the Second Circuit recognized that Congress has the power to legislate beyond the scope recognized by principles of international law, but concluded that "the language of § 10(b) of the . . . [1934] Act is much too inconclusive to lead us to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security." *Id.* at 1334, *citing* 15 U.S.C. § 78j(b) (1976).

38. See, e.g., *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (court acknowledged inability to indicate the part of the legislative history of the 1934 Act that compelled its conclusion that Americans should be permitted to maintain their suit in a transnational securities case); *Loomis & Grant*, *supra* note 2, at 6; *Transnational Securities Fraud*, *supra* note 4, at 553.

39. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965).

40. See, e.g., *SEC v. Kasser*, 548 F.2d 109, 113 n.12 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *Venture Fund Int'l v. Willkie Farr & Gallagher*, 418 F. Supp. 550, 554 (S.D.N.Y. 1976); *Recaman v. Barish*, 408 F. Supp. 1189, 1194-95 (E.D. Pa. 1975). See also *Transnational Securities Fraud*, *supra* note 4, at 554.

41. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 10-36 (1965).

wherever the conduct occurs.”⁴² Relying on this principle, it may be argued that a domestic corporation is required to register *every* nonexempt offering of securities, even those which take place exclusively in a foreign country. This argument, however, has met with little success.⁴³

The other two principal bases upon which a state may exercise jurisdiction consistent with international law principles are more limited since they arise primarily from the territorial powers of the state. The Restatement provides that “[a] state has jurisdiction to prescribe a rule of law . . . attaching legal consequences to *conduct that occurs within its territory*, whether or not such consequences are determined by the effects of the conduct outside the territory, and relating to . . . [an] interest localized in its territory.”⁴⁴ In addition, even if the conduct occurs wholly outside of the state, the Restatement provides that

[a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an *effect within its territory*, if . . . the conduct and its effects are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems.⁴⁵

42. *Id.* § 30(1)(a). Section 30(1)(b) provides an alternative basis for jurisdiction: “A state has jurisdiction to prescribe a rule of law as to the status of a national or as to an interest of a national, wherever the thing or other subject-matter to which the interest relates is located.” *Id.* § 30(1)(b). On the other hand, a state has *no* jurisdiction “to prescribe a rule of law attaching legal consequences to conduct of an alien outside . . . [the state’s] territory merely on the ground that the conduct affects one of . . . [the state’s] nationals.” *Id.* § 30(2).

43. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975). In *IIT*, the Second Circuit refused to apply § 30(1)(a) to a case involving transnational securities transactions. *Id.* The court noted that “[a]lthough the United States has power to prescribe the conduct of its nationals everywhere in the world, . . . Congress does not often do so and courts are forced to interpret the statute at issue in the particular case.” *Id.* Referring to the securities laws, the court reasoned that “[i]t is ‘simply unimaginable that Congress would have wished the anti-fraud provisions of the securities laws to apply if, for example, . . . [the American defendant] while in London had . . . defrauded only European investors.’” *Id.* The Second Circuit concluded that the fact that one of the defendants was a United States citizen did not “alone . . . give subject matter jurisdiction.” *Id.*

44. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965) (emphasis added). The Restatement provides the following illustrations of how § 17 operates:

Illustrations:

1. X hides a bomb aboard a plane in state A. The bomb explodes while the plane is flying over state B, causing the plane to crash, killing all the passengers. A has jurisdiction to prescribe a criminal penalty for homicide.
2. X and Y are in state A. X makes a misrepresentation to Y. X and Y go to state B. Solely because of the prior misrepresentation, Y delivers money to X. A has jurisdiction to prescribe a criminal penalty for obtaining money by false pretenses.

Id., Comment a, Illustrations 1, 2.

45. *Id.* § 18(a) (emphasis added). Section 18 also provides that

[a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if

- (b)(1)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and

Courts have focused on the latter two bases for jurisdiction⁴⁶ in cases involving transnational securities transactions.⁴⁷ Although the facts of each case vary greatly, the ultimate issue has been the amount of conduct or the magnitude of effect required before subject matter jurisdiction attaches under the securities laws.⁴⁸ While it is apparent that a foreign issuer offering securities in the United States is engaged in conduct sufficient to require compliance with the federal registration requirements,⁴⁹ other cases involving transnational securities transactions and conduct occurring in the United States are not so clear.⁵⁰ Similarly, it has been difficult for courts to determine the point at which jurisdiction attaches when it is predicated upon the asserted effects of conduct that occurs outside the United States.⁵¹

III. THE SEC POSITION

A. Release 4708

Responding to the recommendations of a Presidential Task Force convened to develop programs to increase foreign marketing of American securities,⁵² the SEC promulgated Securities Act Release No. 4708 (Release

foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Id. § 18(b).

46. In this comment, reference to the "conduct doctrine or theory" will indicate jurisdiction based on § 17 of the Restatement, while § 18 jurisdiction will be referred to as the "effects doctrine or theory."

47. See, e.g., *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333-34 (2d Cir. 1972). Not all circuits have held that jurisdiction may be based upon either "conduct" in the United States or "effects" in the United States. See *United States v. Cook*, 573 F.2d 281, 283 n.4 (5th Cir.), *cert. denied*, 99 S. Ct. 119, (1978) (court leaves for another day the determination of whether jurisdiction could be grounded solely on the "effects" in the United States). Moreover, at least one circuit has rejected the argument that since principles of international law may permit a country to prescribe the conduct of its nationals everywhere in the world, the securities laws apply if the defendant is a United States citizen. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975).

48. See, e.g., *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

49. See, e.g., *Haber v. Bordas*, [1975] FED. SEC. L. REP. (CCH) ¶ 95,330 (S.D.N.Y. 1975) (registration required for sale of foreign securities in New York); *SEC v. Antoine Silver Mines, Ltd.*, 299 F. Supp. 414 (N.D. Ill. 1968) (Canadian issuer enjoined from distributing shares in United States without registration). See also *Roth v. Fund of Funds, Ltd.*, 405 F.2d 421, 422 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969) (Canadian corporation acts within jurisdiction of United States when it buys and sells securities on New York Stock Exchange).

50. Compare *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) with *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

51. See cases cited in note 48 *supra*. Some commentators suggest that United States courts are incorrect when they apply the principles of international law to the extraterritorial issue since international law principles do not account for such important considerations as international diplomacy and economic policy. See Sanberg, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17 HARV. INT'L L.J. 315 (1976) (commentator would substitute conflicts of law approach).

52. Release 4708, *supra* note 10, ¶ 1361, at 2123-24. In October 1963, a "Presidential Task Force on Promoting Increased Foreign Investment in United States Corporate Securities and Increased Foreign Financing for United States Corporations Operating Abroad" was appointed.

4708).⁵³ According to this release, the SEC will not, as a general proposition, exercise jurisdiction over foreign offerings of American securities directed *exclusively* to foreign investors in foreign countries.⁵⁴ The SEC has maintained, however, that interstate commerce, as defined in the 1933 Act,⁵⁵ "might be construed to encompass virtually any offering of securities made by a United States corporation to foreign investors."⁵⁶ It therefore appears that the SEC's position is not that the statute does not confer jurisdiction over such offerings, but rather that the agency will decline to exercise jurisdiction as a matter of prosecutorial discretion.⁵⁷

Although Release 4708 does not provide a detailed explanation of the SEC's position regarding extraterritorial jurisdiction, it does state that the "Commission has traditionally taken the position that the registration requirements of Section 5 of the Act are primarily intended to protect American investors."⁵⁸ Consequently, the SEC will decline to exercise jurisdiction over an offering as long as the securities distributed come to rest abroad.⁵⁹ Accordingly, "it is immaterial whether the offering originates from within or outside of the United States, whether domestic or foreign broker-dealers are involved and whether the actual mechanics of the distribution are effected within the United States."⁶⁰

Nevertheless, the SEC has acknowledged that there may be situations where registration of a foreign offering would be required if the offering is directed toward American nationals living abroad.⁶¹ In addition, due to the geographic proximity of Canada to the United States, the SEC has maintained that "a distribution . . . through the facilities of Canadian Stock Exchanges may be expected to flow into the hands of American investors and may therefore be subject to registration."⁶² The crucial ingredient for the

Id. at 2123. Among the programs the task force was charged with developing were those "for a review of governmental and private activities adversely affecting such financing, and for an appraisal of the various barriers to such financing remaining in major foreign capital markets."
Id.

53. SEC Securities Act Release No. 4708, 29 Fed. Reg. 9,828, reprinted in 1 FED. SEC. L. REP. (CCH) ¶¶ 1361-1363 (July 9, 1964).

54. Release 4708, *supra* note 10, ¶¶ 1361-1362, at 2123-25. It is important to distinguish between the sale of investment company securities and noninvestment company securities. The former are not covered by Release 4708 since investment companies are always "in registration," thus imposing no additional burden on them to register securities sold abroad. See SEC Securities Act Release No. 5068 [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77, 828, at 83,914-15 (June 23, 1970).

55. For the definition of "interstate commerce" in the 1933 Act, see text accompanying note 30 *supra*.

56. Release 4708, *supra* note 10, ¶ 1362, at 2124.

57. *Id.* See also note 11 *supra*.

58. Release 4708, *supra* note 10, ¶ 1362, at 2124.

59. *Id.* But see note 11 *supra*.

60. Release 4708, *supra* note 10, ¶ 1362, at 2124.

61. *Id.* For example, the SEC specifically noted that an offering directed to American servicemen living abroad would have to be registered. *Id.*

62. *Id.* In other regulatory areas, such as in the periodic and supplementary reporting requirements of § 15(d), the SEC has also differentiated between North American and other foreign issuers. See 17 C.F.R. § 240.15d-16 (1978).

assumption of jurisdiction would thus appear to be the involvement of American investors in the scheme of distribution.⁶³

Beyond the question of the application of section 5 to foreign offerings, Release 4708 also deals with the impact of foreign distributions on the availability of the private placement exemption under the 1933 Act. Generally, the SEC has stated that "transactions otherwise meeting the requirements of this exemption need not be integrated with simultaneous offerings being made abroad."⁶⁴ Presumably, this "simultaneous offering abroad" would still be subject to the requirement that those securities come to rest abroad.⁶⁵

B. SEC No-Action Letters

In addition to administrative releases, the SEC also publishes requests for no-action letters, together with the responses to such requests by the SEC staff. These no-action requests are letters to the SEC seeking interpretive advice or a statement that, on the basis of the facts stated therein, the SEC would not take any enforcement action.⁶⁶ Although no-action letters effectively bind only the SEC and the party requesting the information,⁶⁷ they are nonetheless helpful⁶⁸ in further defining the SEC's position with regard to various securities problems. In particular, numerous no-action letter requests concerning Release 4708 illustrate the practical application by the SEC of the principles announced in that release.

While the majority of the SEC's responses to no-action letter requests concerning registration of extraterritorial offerings endorses a literal inter-

63. According to the SEC, if the requirements of Release 4708 are met, "dealers may trade in other securities of the same class in the United States without regard to the time limitations of the dealer's exemption in Section 4(1) [now 4(3)]." Release 4708, *supra* note 10, ¶ 1362, at 2124.

64. *Id.*

65. *Id.* See Salt Cay Beaches, Ltd., [1974-1975 Transfer Binder] FED. SEC. L. REP. ¶ 79,985 (Oct. 14, 1974); text accompanying note 59 *supra*. Release 4708 also addresses the issue of the applicability of § 15(a) of the 1934 Act, 15 U.S.C. § 780(a) (1976), to foreign underwriters. Release 4708, *supra* note 10, ¶ 1363, at 2125. Basically, the SEC has concluded that if the foreign underwriter participates in a foreign offering of American securities, and limits his activities to sales to foreigners outside the jurisdiction of the United States, then it is not necessary that he register as a broker-dealer pursuant to § 15(a). *Id.*

66. See JENNINGS & MARSH, *supra* note 11, at 33 n.(a).

67. See SEC Securities Act Release No. 4924, [1967-1969 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,606 (Sept. 20, 1968).

68. Although generally helpful, the SEC's practice of issuing no-action letters has been criticized for allegedly resulting in interpretations that are inconsistent with applicable statutes, SEC releases, and judicial decisions. See Loss, *Responsibilities and Liabilities of Lawyers and Accountants—Summary Remarks*, 30 BUS. LAW. 163, 164-65 (March 1975) (Special Issue); Lowenfels, *SEC No-Action Letters: Conflicts With Existing Statutes, Cases and Commission Releases*, 59 VA. L. REV. 303 (1973). The SEC may limit the usefulness of its no-action letters by the statement at the end of its opinion to the effect that "this letter only expresses the Division's position on enforcement action and does not purport to express any legal conclusion on the question presented." See The Singer Co., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,979 (Sept. 3, 1974).

pretation of Release 4708,⁶⁹ at least one letter appears inconsistent with the rest.⁷⁰ The matter involved a United States corporation which proposed to issue stock solely to European nationals living in Europe.⁷¹ The stock certificates were to contain legends restricting their sale in the United States.⁷² Without substantial explanation, the SEC concluded that "it would appear appropriate for the Company to consider the advisability of registering . . . under the Securities Act of 1933."⁷³ In so concluding, the SEC implicitly indicated a concern that although the corporation's shares were not to be offered in the United States, great domestic interest in the corporation might lead to the development of a market in this country and result in a public distribution of the stock.⁷⁴ Since the corporation, however, had expressly agreed to instruct the transfer agent not to transfer shares to American nationals and to employ a restrictive legend on the stock certificate,⁷⁵ the distribution apparently would have been "effected in a manner which will result in the securities coming to rest abroad" as required by Release 4708.⁷⁶ By failing to adequately explain its reasoning with respect to its suggestion that the corporation consider the advisability of registering the foreign offering, the SEC has apparently offered advice that is incompatible with Release 4708.

Despite the apparent inconsistency of this particular response with Release 4708, numerous no-action letters have been issued which are in accord with that release.⁷⁷ In responses in which registration of the foreign offering was not advised, the SEC noted the existence of adequate safeguards designed to protect against the distribution of unregistered securities in the United States.⁷⁸ It appears as though there are at least two prerequisites to

69. See, e.g., H.P. Bulmer, Ltd. (Feb. 24, 1978); Spirit Mountain Farm West (Feb. 6, 1978).

70. See *Frederick's of Hollywood*, [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,569 (Dec. 9, 1971).

71. *Id.* at 81,229.

72. *Id.*

73. *Id.* at 81,228.

74. *Id.* at 81,228-30.

75. *Id.* The corporation also agreed to require letters of nondistributive intent from all purchasers. *Id.* at 81,228. Each purchaser would be required to represent that "he is not a United States national or resident, [and] that he is not buying the shares as agent for any U.S. national or resident." *Id.* Moreover, the share certificates to be "delivered in settlement . . . [would] be registered in a 'recognized marking name.'" *Id.*

76. Release 4708, *supra* note 10, ¶ 1362, at 2124. In many other no-action letter requests, the SEC has indicated that the precautions suggested in *Frederick's of Hollywood* were sufficient to assure that the securities would not be distributed in the United States. See notes 78-81 and accompanying text *infra*.

77. See note 69 and accompanying text *supra*; note 78 *infra*.

78. See, e.g., H.P. Bulmer, Ltd. (Feb. 24, 1978) (registration not required where no American market existed, purchasers signed letter evidencing nondistributive intent, and restrictive legends employed); Spirit Mountain Farm West (Feb. 6, 1978) (registration not required because offering circular, suitability letter, subscription letter, and certificates contained absolute prohibition with respect to resale to United States or Canadian citizens or their agents); Foote, Cone & Belding Communications, Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,523 (June 21, 1976) (registration not required where purchasers were limited in amount of

receiving SEC approval to conduct an unregistered foreign distribution. First, the issuer should utilize restrictive legends on the share certificates.⁷⁹ The SEC has recognized that the primary benefit of restrictive legends is to insure "that . . . [the shares] are not sold, transferred or otherwise disposed of to citizens or residents of the U.S. unless they are registered . . . or in the opinion of . . . counsel an exemption from registration is available."⁸⁰ Second, the issuer should require that all purchasers sign a letter of nondistributive intent.⁸¹ In requiring such procedures, the SEC's administrative practice appears consistent with its determination that "the registration requirements of section 5 . . . are primarily intended to protect American investors."⁸²

IV. MAJOR JUDICIAL DECISIONS

To date, there has not been a judicial decision in which the jurisdictional scope of the registration requirements of the 1933 Act was the sole

purchases and restrictive legends employed). *See also* Popular Espagnol Int'l N.V., [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,184 (Dec. 21, 1972) (Netherlands corporation may sell notes to foreign banks and foreign branches of American banks without registration); Test Corp., [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 78,131 (April 19, 1971) (SEC refused no-action position when corporation only planned to prohibit redistribution into the United States for one year).

At least one court has recognized that restrictive legends are the most effective device for preventing the sale of restricted securities. *See* SEC v. Management Dynamics, Inc., 515 F.2d 801, 810 (2d Cir. 1975). The SEC apparently agrees. *See* SEC Securities Act Release No. 5226, 37 Fed. Reg. 600, reprinted in 1 FED. SEC. L. REP. (CCH) ¶ 2785, at 2923-3 (Jan. 10, 1972) (SEC strongly recommends use of restrictive legends in privately placed securities).

79. *See, e.g.*, H.P. Bulmer, Ltd. (Feb. 24, 1978); Spirit Mountain Farm West (Feb. 6, 1978); Foote, Cone & Belding Communications, Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,523 (June 21, 1976).

80. *See* Sulpetro Int'l, Ltd. (Aug. 25, 1977). In this letter, the SEC permitted a Louisiana corporation to sell shares to alien partners of a West German limited partnership without registration. The shares had been acquired in a private placement pursuant to rule 146, 17 C.F.R. § 230.146 (1978), one year earlier. Resale of the shares was therefore restricted. In addition to permitting the shares to be sold in an unregistered transaction, the SEC stated that the sale to the West German limited partnership would not affect the status of the previous rule 146 transaction. The SEC agreed with the corporation's argument that since nonresidents who may receive securities in a simultaneous foreign offering are not included in the determination of the availability of the private placement exemption to registration, it would be inconsistent to have a subsequent foreign offering affect the status of the prior transaction. *See also* note 78 *supra*.

81. *See, e.g.*, H.P. Bulmer, Ltd. (Feb. 24, 1978); Spirit Mountain Farm West (Feb. 6, 1978). For an example of the language used in a letter of nondistributive intent, *see* note 75 *supra*.

82. Release 4708, *supra* note 10, ¶ 1362, at 2124. *See* text accompanying note 58 *supra*. In a related area, the SEC has indicated that its primary concern with respect to the registration requirements under rule 144, 17 C.F.R. § 230.144 (1978), is with activities in the domestic markets. *See* Genstar, Ltd., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,358 (Oct. 6, 1975). Specifically, the SEC has noted that "one of the chief purposes underlying the adoption of rule 144 was to facilitate sales of relatively small amounts of restricted securities in the domestic markets of the United States." *Id.* In *Genstar, Ltd.*, the corporation generally conducted its share transactions over foreign exchanges. *Id.* It unsuccessfully contended that the volume limitations of rule 144 should be determined by reference to transactions conducted on all exchanges and not solely by the volume traded on American exchanges. *Id.*

issue confronting the court.⁸³ Although a number of cases involved allegations that the defendants had violated section 5, violations of the antifraud provisions of the 1933 Act⁸⁴ and the 1934 Act⁸⁵ were also alleged.

83. In 1975, the United States District Court for the Southern District of New York decided a case in which the sole question was whether a foreign defendant had violated the registration requirements of the 1933 Act. *See Haber v. Bordas*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,330 (S.D.N.Y. 1975). The court, however, focused on the issue of whether the seller had satisfied the requirements of the "private offering" exemption. *Id.* at 98,658. The jurisdictional issue was resolved by a mere citation to *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1973). [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,330, at 98,658. In addition, *Haber* provides little insight into the question of the extraterritorial reach of § 5 since the sale was to an American investor and the transaction took place in the United States. *Id.* at 98,656-57. There was therefore little support for the argument that the court lacked jurisdiction. *See also* note 49 and accompanying text *supra*.

84. The 1933 Act contains two antifraud provisions. *See* 15 U.S.C. §§ 771(2), 77q (1976). Section 12(2) provides that a purchaser may recover damages from his seller if the prospectus delivered to him is false or misleading. *Id.* § 771(2). *See also* notes 19 & 25 and accompanying text *supra*. Section 17, on the other hand, is similar to § 10(b) of the 1934 Act, 15 U.S.C. § 78j (1976), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1978). 15 U.S.C. § 77q (1976). For the text of § 10(b) of the 1934 Act, *see* note 85 *infra*. Specifically, § 17 provides in pertinent part:

It shall be unlawful for any person in the offer or sale of any securities . . .

- (1) to employ any device, scheme, or artifice to defraud or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q (1976). The major difference between § 17 and § 10(b) and rule 10b-5 is that the former has been construed to provide relief only to purchasers of securities, 3 L. LOSS, SECURITIES REGULATION 1785 (2d ed. 1961), while the latter is available to both purchasers and sellers of securities. *See, e.g., Ellis v. Carter*, 291 F.2d 270, 272-74 (9th Cir. 1961); *Kardon v. National Gypsum Co.*, 73 F. Supp. 798, 800 (E.D. Pa. 1974). Moreover, it is clear that § 10(b) and rule 10b-5 provide the basis for an implied private damages remedy. *See, e.g., Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). Whether § 17 provides a basis for such an implied remedy is unresolved. *See Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 223-34 (S.D.N.Y. 1973). The antifraud provisions of the 1933 Act apply regardless of whether registration is required. *See* text accompanying note 19 *supra*.

85. 15 U.S.C. § 78j (1976). Section 10(b) provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

- (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id. The SEC has promulgated rule 10b-5 pursuant to § 10(b). This rule provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1978).

Moreover, in resolving the issue of the jurisdictional scope of the securities laws, the courts have focused upon the fraudulent conduct⁸⁶ and have not distinguished between the various substantive provisions contained in the statutes.⁸⁷ Nevertheless, an examination of these decisions reveals numerous factors which may be important to the resolution of the question of the scope of the registration requirements of the 1933 Act.

A. The Second Circuit's Approach

The vast majority of cases examining the jurisdictional reach of the securities laws has been decided by the United States Court of Appeals for the Second Circuit. Over a period of seven years, the Second Circuit decided four cases which have received general acceptance throughout the circuits.⁸⁸

The first of these cases was decided in 1968. In *Schoenbaum v. Firstbrook*,⁸⁹ an American shareholder of a Canadian corporation brought a shareholder derivative action alleging that the corporation's directors had violated section 10(b) of the 1934 Act⁹⁰ and rule 10b-5⁹¹ in connection with the sale of treasury shares.⁹² The corporation had allegedly sold the treasury shares to its parent corporation and an American corporation at an artificially low price.⁹³ Although the court ultimately dismissed the plaintiff's

86. See, e.g., *SEC v. United Financial Group, Inc.*, 474 F.2d 354, 356 n.2 (9th Cir. 1973); *Recaman v. Barish*, 408 F. Supp. 1189, 1191, 1194-95 (E.D. Pa. 1975).

87. See *Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975). In *Barish*, the court noted that "[t]he language of . . . [the 1933 and 1934 Acts] and the statutes' purpose in regulating securities dealings has led the courts to conclude that the jurisdictional reach of both acts is coextensive." *Id.* at 1194, citing *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 446, 453 (S.D.N.Y. 1974), modified, 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975).

88. See generally *United States v. Cook*, 573 F.2d 281 (5th Cir.), cert. denied, 99 S. Ct. 119 (1978); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977); *United States v. Kasser*, 548 F.2d 109 (3d Cir.), cert. denied, 431 U.S. 938 (1977); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973); *Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975).

In noting the high regard traditionally accorded the decisions of the Second Circuit, Justice Blackmun has stated that the circuit is "the 'Mother Court' in . . . [the securities] area of the law." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting) (footnote omitted).

89. 405 F.2d 200 (2d Cir.), modified on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969). Prior to *Schoenbaum*, at least one district court had held that where all the essential components of a stock transaction occurred outside the United States, § 30(b) of the 1934 Act, 15 U.S.C. § 78dd (1976), prevented the court from assuming jurisdiction in an action under § 7(c) of that statute, *id.* § 78g(3), even though instrumentalities of interstate commerce were utilized and the defendant was a registered broker-dealer under § 15, *id.* § 78o. See *Kook v. Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960). The court concluded that "'jurisdiction' as used in Section 30(b) contemplates some necessary and substantial act within the United States. This . . . section . . . was written with the present situation in mind." *Id.* at 390-91. See also *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.*, 303 F. Supp. 1354, 1358 (S.D.N.Y. 1969); *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385, 386 (S.D.N.Y. 1969).

90. 15 U.S.C. § 78j (1976).

91. 17 C.F.R. § 240.10b-5 (1978).

92. 405 F.2d at 204.

93. *Id.* at 205. The plaintiff's corporation, Banff Oil Ltd., was controlled by Aquitaine, another Canadian corporation. *Id.* at 204. The corporations were involved in joint oil exploration and Banff allegedly sold its treasury shares to Aquitaine in order to help finance its share of the

complaint for failure to state a cause of action under rule 10b-5, it concluded that

the district court . . . [had] subject matter jurisdiction over violations of the Securities Exchange Act although the transactions which are alleged to . . . [have violated] the Act . . . [took] place outside the United States, at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to . . . American investors.⁹⁴

The *Schoenbaum* court further reasoned that when acts committed outside a jurisdiction cause harm within it, the government is justified "in punishing the cause of the harm as if [the actor] had been present at the [time of the detrimental] effect."⁹⁵ The Second Circuit found the necessary harm in the fact that the corporation had received less than fair value for its treasury shares, thus reducing the equity of the corporation's shareholders and lowering the market price of the stock on the domestic stock market.⁹⁶ The court concluded that "[t]his impairment of the value of American investment . . . [has] a sufficiently serious effect upon United States commerce."⁹⁷

Perhaps the most significant aspect of the *Schoenbaum* decision is the manner in which the court resolved the defendant's claim that section 30(b) of the 1934 Act⁹⁸ immunized the transaction from the operation of rule 10b-5. Section 30(b) provides, in part, that "[t]he provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United

exploration expenses. *Id.* at 204-05. Banff subsequently sold treasury shares to a Delaware corporation in order to finance additional exploration and pipeline expenses. *Id.* at 205. The plaintiffs alleged that prior to the aforementioned share transactions, Banff's directors knew that the company had discovered valuable oil properties but had failed to disclose this information. *Id.* As a result, the market price of the stock remained low, making the purchase price for the treasury shares, which were purchased at the market price, clearly inadequate. *Id.* The plaintiffs argued that the directors and corporate purchasers of the treasury shares had conspired to sell the shares at an artificially low price. *Id.* at 205-06.

94. *Id.* at 208. See also *Selzer v. Bank of Bermuda, Ltd.*, 385 F. Supp. 415 (S.D.N.Y. 1974). Two years later, the United States District Court for the Southern District of New York relied on *Schoenbaum* to dismiss a case for lack of jurisdiction. See *Finch v. Marathon Sec. Corp.*, 316 F. Supp. 1345, 1349 (S.D.N.Y. 1970). Noting that the holding in *Schoenbaum* only applied to domestic investors who purchased foreign securities on American exchanges, the *Finch* court concluded that "a district court is without subject matter jurisdiction over a cause of action alleging no domestic injury or consequence, brought by a British resident against other foreigners, for injuries sustained as a result of being fraudulently induced in a foreign country to purchase securities of an alien corporation." *Id.* See also *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 F.R.D. 385 (S.D.N.Y. 1969).

95. 405 F.2d at 206, quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

96. 405 F.2d at 206-09.

97. *Id.* at 208-09. To substantiate this determination, the court noted "that Congress intended the . . . [1934] Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities." *Id.* at 206.

98. 15 U.S.C. § 78dd(b) (1976).

States.”⁹⁹ Although on its face this section would appear to immunize the transaction at issue in *Schoenbaum*, the court concluded that the provision does not apply to “persons who engage in isolated foreign transactions.”¹⁰⁰ It would therefore appear that the regulatory impact of section 30(b) is limited to the activities of broker-dealers.¹⁰¹

Four years after *Schoenbaum*, the Second Circuit again addressed the issue of the extraterritorial reach of the 1934 Act. In *Leasco Data Processing Equipment Corp. v. Maxwell*,¹⁰² Leasco, an American corporation, had purchased shares of a British corporation over the London Stock Exchange.¹⁰³ The American plaintiff¹⁰⁴ alleged that the British corporation and its controlling shareholder, along with other defendants, had conspired to cause the plaintiff to purchase the stock well in excess of its true value, thus violating section 10(b) and rule 10b-5.¹⁰⁵ Rejecting the defendants’ ar-

99. *Id.* Section 30(b), however, also empowers the SEC to prescribe rules applicable to persons who “transact a business in securities without the jurisdiction of the United States” if the agency believes that the exercise of such rulemaking power is necessary to prevent evasion of the 1934 Act. *Id.* Section 30(a), another important aspect of the regulatory scheme, provides in pertinent part:

(a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this chapter.

Id. § 78dd(a). It may be significant that a provision comparable to § 30 does not appear in the 1933 Act. Moreover, the SEC has failed to exercise its rulemaking authority pursuant to the § 30 grant. See Karmel, *supra* note 4, at 671.

100. 405 F.2d at 207-08. The court recognized that its holding with respect to § 30(b) was contrary to the previous district court decision in *Ferraioli v. Cantor*, [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91, 615 (S.D.N.Y. 1965). 405 F.2d at 208. Nevertheless, the Second Circuit concluded that “§ 30(b), . . . was not meant to exempt transactions that are conducted outside the jurisdiction of the United States unless they are part of a ‘business in securities.’” *Id.* See also *Roth v. Fund of Funds, Ltd.*, 405 F.2d 421 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969). In addition, the *Schoenbaum* court noted that § 30(a) was primarily intended to confer on the SEC the power to regulate brokers and dealers who use the mails to effect transactions in American securities on foreign exchanges. 405 F.2d at 207.

101. See 405 F.2d at 207-08.

102. 468 F.2d 1326 (2d Cir. 1972).

103. *Id.* at 1330.

104. Leasco had actually purchased the shares through its Netherlands Antilles subsidiary. *Id.* at 1332. The defendants argued that since the purchaser was technically not an American, the court lacked subject matter jurisdiction. *Id.* at 1337-38. The court, however, found that the foreign subsidiary was nothing more than the “alter ego of the American.” *Id.* at 1338 (emphasis supplied by the court).

105. *Id.* at 1330. Specifically, the plaintiffs had met in the United States and in England with employees of the defendant corporation, at which time the defendants allegedly made numerous misrepresentations. *Id.* As a result of these meetings, Leasco agreed to purchase the British corporation through a tender offer to be made either by it or by its Netherlands Antilles subsidiary. *Id.* at 1332. Prior to the scheduled tender offer, the defendants allegedly misrepresented to the plaintiff that a countertakeover bid was rumored, and that the plaintiff should begin its purchases at a date earlier than planned. *Id.* Leasco subsequently purchased \$22,000,000 of the defendant corporation’s stock, but did not go through with the complete tender offer. *Id.* at 1332-33.

guments that the court lacked subject matter jurisdiction over the controversy, the Second Circuit held that the defendants' conduct in the United States was sufficient to warrant the assumption of jurisdiction.¹⁰⁶

Significantly, in arriving at this conclusion, the *Leasco* court conducted a detailed analysis of the Restatement and its pertinent provisions.¹⁰⁷ Although the court recognized that Congress may legislate beyond the limitations imposed by principles of international law, the Second Circuit was unwilling to conclude that it intended to do so when it enacted section 10(b).¹⁰⁸ The court further noted that in defining the scope of the jurisdiction actually exercised with respect to a particular statute, the ultimate issue remained whether Congress "meant to go to the full extent permitted" by international law.¹⁰⁹ Analyzing the facts of the case together with the policies underlying section 10(b), the *Leasco* court concluded that Congress intended to exercise its power to the full extent permitted under rules of international law.¹¹⁰

The principles developed in *Schoenbaum* and *Leasco*¹¹¹ were further defined by the Second Circuit in its recent decisions in *Bersch v. Drexel*

106. *Id.* at 1337. Specifically, the court noted that "substantial misrepresentations were made in the United States" which were "an essential link" in inducing the plaintiff to make the purchases of the stock. *Id.* at 1335-37. Concerning the strength of the "link" necessary to establish subject matter jurisdiction, the court concluded that

if defendants' fraudulent acts in the United States significantly whetted Leasco's interest in acquiring . . . [the British] shares, it would be immaterial, from the standpoint of foreign relations law, that the damage resulted, not from the contract whose execution Maxwell procured in this country, but from interrelated action which he induced in England or, for that matter, which Leasco took there on its own.

Id. at 1335.

107. *Id.* at 1332-34, construing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). For a discussion of international law principles, see notes 32-51 and accompanying text *supra*.

108. 468 F.2d at 1334. The *Leasco* court concluded that "the language of § 10(b) . . . is much too inconclusive to lead us to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security." *Id.*

109. *Id.* at 1334-35.

110. *Id.* at 1335-37. The court specifically based its conclusion on § 17 of the Restatement, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965). 468 F.2d at 1339. With respect to § 17, the court noted that "[w]hile the black letter seems to require that . . . not only there should be conduct within the territory but also the conduct relate 'to a thing located, or a status or other interest localized, in its territory,' . . . [this section appears] to be satisfied if there has been conduct [alone]." *Id.* at 1334 (footnote omitted). The Second Circuit first analyzed the relationship between the antifraud provisions and the other provisions of the securities laws. *Id.* at 1335. It emphasized the broad remedial purpose of the antifraud provisions by noting that they apply regardless of whether the transaction at issue involved registered securities or securities in organized markets. *Id.* at 1335-36. The court reasoned that "[s]ince Congress thus meant § 10(b) to protect against fraud in the sale or purchase of securities whether or not these were traded on organized U.S. markets, we cannot perceive any reason why it should have wished to limit the protection to securities of American issuers." *Id.* at 1336.

111. These principles were relied upon by at least one district court in a case in which the defendant was indicted for defrauding European investors in violation of § 17 of the 1933 Act, 15 U.S.C. § 77q (1976). See *United States v. Clark*, 359 F. Supp. 131 (S.D.N.Y. 1973). In *Clark*, the defendant offered debentures of a Netherlands corporation with attached warrants for

*Firestone, Inc.*¹¹² and *IIT v. Vencap, Ltd.*¹¹³ Although these cases were decided on the same day, the opinions provide interesting contrasts because the court reached different results while utilizing the same analytical approach.

In *Bersch*, the plaintiff brought a class action alleging that a Canadian corporation,¹¹⁴ with the assistance of American accountants and underwriters, had failed to reveal material facts in prospectuses used in three closely related public offerings.¹¹⁵ The American plaintiff attempted to rep-

the purchase of the common stock of its American parent corporation. *Id.* at 132. The indictment charged that "the European offering was one part of a scheme to convey to the American investing public a false image of the soundness . . . of . . . [the parent corporation], thus artificially inflating the [American corporation's] market price." *Id.* at 134. Noting that the "problems regarding extraterritoriality under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act are essentially similar," the district court proceeded to examine the defendant's conduct in light of the combined impact of *Leasco* and *Schoenbaum*. *Id.* at 133-34. The court noted that there was sufficient evidence of fraudulent conduct in the United States to sustain jurisdiction. *Id.* at 134. Moreover, it noted that the parent corporation's stock "which would be acquired upon exercise of the warrants . . . would be traded in the United States and presumably listed on the American Stock Exchange." *Id.* The requirement that there be a substantial detrimental effect on American investors was therefore satisfied. *Id.*

112. 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975).

113. 519 F.2d 1001 (2d Cir. 1975).

114. 519 F.2d at 977-78. The plaintiffs had purchased the common stock of I.O.S., Ltd. (IOS), a large international sales and financial organization whose primary business involved the sale and management of mutual funds. *Id.* at 978. Although organized under the laws of Canada, IOS also "owned ten banks and finance companies, a life insurance company with subsidiaries in six countries, a group of real estate companies, a couple of small publishing enterprises and a data processing firm." *Id.* at 978 n.3.

IOS stock was primarily owned by its founder, Bernard Cornfield, and by the company's employees. *Id.* at 978. An organized market did not exist for the IOS shares prior to the distributions in question since the employees were prohibited from selling their stock. *Id.* Pressure from its employees led IOS to "go public" before it had originally planned to do so. *Id.* at 979.

115. *Id.* at 981. The three offerings included one primary offering and two secondary offerings. *Id.* at 979-81. The primary offering was underwritten by six investment banking houses, two of which were American companies with European offices. *Id.* at 979. The court referred to these defendant underwriters as the "Drexel Group." *Id.* The 5,600,000 shares included in this primary offering were sold by prospectus "outside the United States [and only] to foreign nationals residing in Europe, Asia and Australia." *Id.* at 979-80. Similarly, the second offering was directed exclusively to non-Americans located in Canada. *Id.* at 980. This offering was underwritten by a Toronto investment house and was sold by prospectus pursuant to the laws of Canada. *Id.*

The final offering led to the commencement of the suit in *Bersch*. *Id.* It involved a secondary offering of 3,950,000 shares to approximately 25,000 persons who were either "(1) employees or sales associates of the Company, (2) certain clients . . . [who held] investments in managed funds or other products of the Company, or (3) persons who . . . had a long-standing professional business relationship with the Company." *Id.* This offering was sold through an IOS subsidiary located in the Bahamas. *Id.*

The prospectuses employed in the first and third offerings stated that the shares "are not being offered in the United States of America or any of its territories or possessions or any area subject to its jurisdiction" and have not been registered under the United States securities laws. *Id.* at 980-81. Moreover, the prospectuses for all three offerings contained four important items. First, each offering was made for \$10.00 per share. *Id.* at 980. Second, each offering referred to the other two offerings. *Id.* Third, the prospectuses indicated that IOS planned to list its stock on various exchanges, none of which were located in the United States. *Id.* Finally, all the prospectuses contained balance sheets and income statements audited by Arthur Andersen & Co., an international accounting firm based in the United States. *Id.*

resent a class consisting of thousands of investors, the overwhelming majority of whom were citizens and residents of foreign countries.¹¹⁶ In a lengthy opinion, the Second Circuit held that subject matter jurisdiction existed solely with respect to those purchasers who were residents or citizens of the United States.¹¹⁷

Recognizing that international law principles would permit the court to exercise jurisdiction with respect to the entire class of plaintiffs,¹¹⁸ Judge Friendly, writing for a unanimous court in *Bersch*, noted that the precise jurisdictional question was whether, in a predominantly foreign transaction, "Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."¹¹⁹ Judge Friendly concluded that neither *Schoenbaum* nor *Leasco* was controlling since "the precise grounds on which jurisdiction was upheld in those cases" was not present.¹²⁰

The Second Circuit rejected the foreign plaintiffs' argument that the defendants' conduct in the United States was sufficient to form a basis for subject matter jurisdiction.¹²¹ Specifically, the court determined that the fraud was committed when the misleading prospectuses were delivered to

The misrepresentations alleged by the plaintiffs included the following: 1) the prospectuses failed to reveal illegal activity by IOS and its officers; 2) the books and records of IOS were in a state of chaos, thus making it impossible to properly analyze that company's financial condition; and 3) the financial statements were false and misleading in various respects. *Id.* at 981. Moreover, the plaintiffs alleged: 1) that "the underwriters 'impliedly represented to the public that IOS was a suitable company for public ownership' when . . . they should have known that it was not;" 2) that "during the months preceding the offering various IOS officials . . . had touted IOS' prospects;" 3) that "the underwriters in the Drexel Group had failed to use due diligence with regard to their prospectus;" and 4) that the accounting firm had "failed to observe generally accepted accounting principles in connection with its audit." *Id.* As a result of these misrepresentations, the plaintiffs purchased the stock which, shortly thereafter, became worthless. *Id.*

116. *Id.* at 977-78. The Second Circuit noted that the purchasers were predominately "citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America." *Id.* at 978.

117. *Id.* at 997. In so holding, the Second Circuit reversed that part of the district court's decision which extended subject matter jurisdiction to all plaintiffs regardless of nationality or residency. *Id.* at 983-84, 1000.

118. *Id.* at 985. The court stated that § 17 of the Restatement would permit the United States to assume jurisdiction in light of the numerous activities conducted by the defendants in this country. *Id.*, citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

119. 519 F.2d at 985. The Second Circuit reasoned that "it would be . . . erroneous to assume that the legislature always means to go to the full extent permitted [by the principles of international law]." *Id.*, quoting *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972).

120. 519 F.2d at 985. The *Bersch* court noted that in *Schoenbaum*, the stock of the corporation was listed on the American Stock Exchange and the plaintiffs were American shareholders. *Id.* at 985-86. Similarly, Judge Friendly observed that in *Leasco*, the misrepresentations were made in the United States. *Id.* at 986. Moreover, the court concluded that "neither *Schoenbaum* nor *Leasco* raised the serious problem here presented of the dubious binding effect of a defendants' judgment (or a possibly inadequate plaintiff's judgment) on absent foreign plaintiffs or the propriety of purporting to bind such plaintiffs by a settlement." *Id.* (footnote omitted).

121. *Id.* at 989-90.

the purchasers.¹²² Since the prospectuses were mailed to the foreign purchasers from a foreign source, the Second Circuit reasoned that the conduct in the United States was “merely preparatory” and thus could not provide the basis for the assumption of jurisdiction.¹²³ Similarly, the court was not persuaded that the general impact upon the United States economy resulting from the collapse of the corporation in which the plaintiffs owned stock provided a sufficient basis for jurisdiction.¹²⁴ Noting that a more direct effect in the United States was required,¹²⁵ the court concluded that the “effects” doctrine¹²⁶

does not support subject matter jurisdiction if there was no intention that the securities should be offered to anyone in the United States, simply because in the long run there was an adverse effect on this country's general economic interests or on American security prices. . . . This means to us that there is subject matter jurisdiction of fraudulent acts relating to securities which are committed abroad *only when these result in injury to purchasers or sellers of those securities in whom the United States has an interest, not where acts simply have an adverse affect [sic] on the American economy or American investors generally.*¹²⁷

122. *Id.*

123. *Id.* at 987. The defendants' conduct in the United States included the following actions: 1) meetings by the underwriters in New York to structure the offer; 2) a New York law firm represented the underwriters at meetings with the corporation; 3) the underwriters met with the SEC; 4) the underwriters retained American accountants; 5) part of the prospectus was drafted in New York and was read over the phone to the Geneva office; 6) some of the proceeds were deposited in a New York bank pending remittance to the corporation; and 7) a draft of the prospectus was shown to the underwriters in New York. *Id.* at 985 n.24. While recognizing that foreign plaintiffs were permitted to sue in *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), the court concluded that there was “no reason to extend . . . [IIT] to cases where the United States activities are merely preparatory or take the form of culpable nonfeasance and are relatively small in comparison to those abroad.” 519 F.2d at 987.

124. 519 F.2d at 988. Proof of the adverse economic impact in the United States of the collapse of IOS was by way of an affidavit submitted by an associate professor of finance at the Wharton School of the University of Pennsylvania. *Id.* at 987. The major conclusions of the affidavit were that the collapse of IOS caused: 1) a loss of investor confidence in American underwriters; 2) a steep decline in the purchase of American securities by foreigners with the attendant adverse effects on the United States balance of payments and the price of American securities generally; and 3) a loss of confidence in the American “disclosure systems” since IOS was identified as an American company. *Id.* at 987-88.

125. *Id.* at 987-89.

126. See note 127 and accompanying text *infra*; notes 45 & 46 and accompanying text *supra*.

127. 519 F.2d at 989 (footnotes omitted) (emphasis added). The Second Circuit observed that [t]his principle [that is, the “effects doctrine”] would support subject matter jurisdiction if a defendant, even though acting solely abroad, had defrauded investors in the United States by mailing false prospectuses into this country, . . . or if . . . the number of shares of a company traded on American exchanges was increased by a sale to insiders without adequate consideration at least when this is imperfectly disclosed. . . .

Id. (citations omitted). The court also noted that “[t]hese considerations are particularly important in view of the limitations in § 17(a) of the 1933 Act to acts in ‘the offer or sale of any securities’ and in § 10(b) of the 1934 Act to acts ‘in connection with the purchase or sale of any security.’” *Id.*, quoting 15 U.S.C. §§ 77q(a), 78j(b) (1976). Moreover, the Second Circuit was unwilling to combine the “conduct” in the United States with the “effects” in the United States to provide jurisdiction where each factor, standing alone, was insufficient to sustain jurisdiction. 519 F.2d at 989-90.

In contrast to its holding with respect to the foreign plaintiffs, the *Bersch* court had little difficulty sustaining jurisdiction for the resident American plaintiffs.¹²⁸ The Second Circuit found that the mailing of the misleading prospectuses into the United States was a sufficiently direct effect to warrant jurisdiction regardless of where the culpable conduct occurred.¹²⁹ The court, however, noted that “[w]hether Congress intended that . . . [nonresident American plaintiffs] should be entitled to obtain damages for violation of the securities laws is a different and closer question.”¹³⁰ Nevertheless, the court sustained jurisdiction¹³¹ and concluded that “[w]hile merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident.”¹³²

128. 519 F.2d at 991-93.

129. *Id.* The Second Circuit concluded that “action [by the defendants] in the United States is not necessary when subject matter jurisdiction is predicated on a direct effect here.” *Id.* at 991.

130. *Id.* at 992. The court noted that if the defendants had not engaged in significant conduct in the United States, the securities laws would not apply even if the purchasers were nonresident Americans and the seller was a United States corporation. *Id.* Specifically, it reasoned that Congress surely did not mean the securities laws to protect the many thousands of Americans residing in foreign countries against securities frauds by foreigners acting there, and we see no sufficient reason to believe that it would have intended otherwise simply because an American participated so long as he had done nothing in the United States.

Id. The Second Circuit, however, concluded that defendants’ preparatory activities in the United States satisfied the “significant conduct” standard. See notes 131 & 132 and accompanying text *infra*.

131. *Id.* The Second Circuit accepted the district court’s conclusion that the third offering, which involved the nonresident Americans, would not have occurred but for the primary offering. *Id.* The defendants’ conduct in making the first offering was therefore viewed as the basis from which subject matter jurisdiction might be asserted. *Id.* For a discussion of the defendants’ activities with respect to the primary offering, see note 123 *supra*. The court cautioned, however, that if the causal relationship between the first and third offerings was not proved at trial, the court would not have subject matter jurisdiction over the controversy. 519 F.2d at 992-93.

132. 519 F.2d at 992. Summarizing its findings, the Second Circuit concluded that the anti-fraud provisions of the federal securities laws apply in the following circumstances:

(1) Apply to losses from sales of securities to American residents in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and (2) Apply to losses from sales of securities to American residents abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but (3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.

Id. at 993.

At least one district court in the Second Circuit has attempted to apply the *Bersch* holding. In *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co.*, 400 F. Supp. 1219 (S.D.N.Y. 1975), a Canadian plaintiff alleged that an offering circular employed in the sale of an American corporation’s debentures was false and misleading. *Id.* at 1221. Despite the fact that the purchase took place, and the offering circular was received, outside the United States, the plaintiff contended that sufficient United States activities existed to warrant the assumption of jurisdiction. *Id.* at 1222. Specifically, he noted that the offering letter was drafted and reviewed in New York, that some sales activity occurred in the United States, and that the financing for the offering was authorized by the corporation’s board of directors in the United States. *Id.* Nevertheless, the court refused to assume jurisdiction, noting that the plaintiff would have to be classified in the third category of the *Bersch* holding before jurisdiction would attach. *Id.* at 1223. Focusing on the time of the actual occurrence of the fraud, the court concluded that it

Unlike *Bersch*, its companion case, *IIT v. Vencap, Ltd.*,¹³³ involved only foreign plaintiffs. In *IIT*, a Luxembourg investment trust, IIT, and its liquidators brought suit against a Bahamian "venture capital firm," Vencap, Ltd., and an American citizen, alleging violations of the antifraud provisions of the securities laws.¹³⁴ The plaintiffs' complaint focused upon events surrounding IIT's purchase of redeemable preferred shares of Vencap.¹³⁵ Although the Second Circuit rejected the plaintiffs' argument that the American citizenship of one of the defendants¹³⁶ and American investment in IIT¹³⁷ were sufficient to sustain subject matter jurisdiction, it nonetheless permitted the plaintiffs to maintain their suit.

Focusing on the defendants' conduct in the United States,¹³⁸ the Second Circuit posited that "[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when . . . [they] are peddled only to foreigners."¹³⁹ The Second Circuit therefore reasoned that if the plaintiffs could prove that the fraudulent acts were committed in the United States, the securities laws would apply.¹⁴⁰ Although the court noted possible theories upon which the

was the time at which the offering circulars were distributed to the plaintiff. *Id.* Since this distribution took place outside the United States, the court reasoned that under the principles announced in *Bersch*, it lacked jurisdiction. *Id.* Moreover, it noted that "[t]he fact that the issues . . . are American is of little independent significance." *Id.*

133. 519 F.2d 1001 (2d Cir. 1975).

134. *Id.* at 1003-04.

135. *Id.* at 1003-11. After approximately nine months of negotiations, IIT agreed to purchase redeemable shares of Vencap. *Id.* at 1003-07. Vencap had been organized three months earlier primarily through the efforts of Richard C. Pistell, a United States citizen residing in the Bahamas. *Id.* at 1004-05. The plaintiffs alleged, *inter alia*, that Vencap committed fraud when it took funds received as a result of the purchase of the redeemable share by IIT and converted them to the personal use of Pistell through the facilities of Vencap's New York office. *Id.* at 1008-11.

136. *Id.* at 1016. In particular, the court noted that Congress is reluctant to exercise its authority to regulate the conduct of American citizens in other parts of the world, and concluded that "[i]t . . . [is] simply unimaginable that Congress would have wished the anti-fraud provisions of the securities laws to apply if, for example, Pistell while in London had done all the acts here charged and had defrauded only European investors." *Id.*

137. *Id.* The plaintiffs argued that since IIT had American fundholders, Pistell's activities caused a significant effect in the United States, thus warranting the assumption of jurisdiction. *Id.* Although controversy existed as to the exact amount of American investment in the fund, the court placed the maximum figure at .5% of the total. *Id.* The Second Circuit concluded that this amount was not the "substantial effect" required by the principles of international law. *Id.* at 1017. See note 45 and accompanying text *supra*. Moreover, the court emphasized that unlike *Bersch*, the fraud in *IIT* was perpetrated upon the trust in which the Americans had invested and not upon the American investors themselves. 519 F.2d at 1016.

138. 519 F.2d at 1017-18. The IIT court focused primarily upon the defendants postsale conduct in the United States since it found that the presale conduct did not produce a sufficient basis to sustain jurisdiction. *Id.* at 1018. Specifically, the court concluded that "the exchange by the American attorneys for IIT and Vencap of drafts of the purchase agreement [for the redeemable shares] . . . simply formalized what seems to have been a deal worked out in the Bahamas." *Id.*

139. *Id.* at 1017.

140. *Id.* The court explicitly limited its holding when it observed that its "ruling on the basis of jurisdiction is limited to the perpetration of the fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was to be performed in foreign countries." *Id.* at 1018. (Emphasis added).

defendants' post sale conduct might support jurisdiction, it remanded for a determination of "whether the district judge considered . . . [the activity in the United States] to be within Rule 10b-5."¹⁴¹

B. *The Third Circuit's View*

Until 1976, the United States Court of Appeals for the Third Circuit had not addressed the issue of the extraterritorial reach of the securities laws.¹⁴² In successive years, however, two cases were decided which involved transnational securities transactions and allegations of fraud. While both cases refer to the Second Circuit's precedent, at least one appears to provide a more expansive view of the jurisdictional scope of the securities laws.

In *Straub v. Vaisman & Co.*,¹⁴³ a foreign corporation sued a New Jersey broker-dealer for fraudulently inducing it to purchase the securities of an American corporation which went bankrupt less than one month after the purchase.¹⁴⁴ Noting that the transaction was not "predominantly foreign," the Third Circuit held that when an American broker, by failing to disclose material information, induces a foreign corporation to purchase American securities which are traded on an American exchange, the foreign plaintiffs

Moreover, the Second Circuit recognized that the "distinction is a fine one." *Id.* It reasoned that such a line must be drawn, however, to prevent the securities laws from applying in every instance where some activity has occurred in the United States. *Id.*

141. *Id.* at 1018. The theories suggested by the IIT court focused upon the defendant's conduct subsequent to the sale of the securities. *Id.* Specifically, the court noted that if Vencap fraudulently represented the intent to operate as a bona fide "venture capital firm" and, after receiving the plaintiffs' investment, used its New York office to convert the funds to Pistell's personal use, it was arguable that the fraud was not committed until Vencap engaged in the conduct in the United States. *Id.* at 1013, 1018.

142. Prior to 1976, however, the United States District Court for the Eastern District of Pennsylvania had examined the extraterritorial issue twice. See *Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975); *Selas of America (Nederland) v. Selas Corp. of America*, 365 F. Supp. 1382 (E.D. Pa. 1973). In *Selas*, the court permitted a foreign corporation and its Dutch employees to maintain a rule 10b-5 action against its parent, an American corporation, noting that "it . . . [was] clear that sufficient conduct took place within the U.S. . . . and that the transaction in question . . . [had] a significant impact on the American securities markets." *Id.* at 1386. The court noted that the agreement providing for the transfer of the shares was made in the United States and that the fraudulent acts occurred in the United States. *Id.* In contrast, in *Recaman*, the district court held that it lacked subject matter jurisdiction in an action brought by South Americans against a Bahamian investment trust fund since there was insufficient conduct in the United States and little impact on American investors or the domestic securities markets. 408 F.Supp. at 1197-202.

143. 540 F.2d 591 (3d Cir. 1976).

144. *Id.* at 593-94. The defendant had recommended that the plaintiff purchase the securities on several occasions prior to the transaction in question. *Id.* at 594. In late 1972, the defendant telexed the plaintiff and recommended the purchase of 10,000 shares of Mark I Offset (Mark I), an American corporation. *Id.* The defendant, however, failed to disclose that it was a financial consultant to Mark I and was aware of the company's imminent bankruptcy. *Id.* Moreover, the defendant failed to disclose that it held a controlling interest in Mark I and that the market price of the securities was less than the recommended purchase price. *Id.* The district court judge found the defendant's "conduct shocking to the conscience of the court." *Id.*

may sue under the securities laws.¹⁴⁵ Moreover, the court noted that "on policy grounds the interest of the United States in regulating the conduct of its brokers-dealers in this country and enhancing world confidence in its securities market is ample justification for applying the securities laws."¹⁴⁶

While *Straub* is consistent with the prior decisions of the Second Circuit, the most recent Third Circuit case, *SEC v. Kasser*,¹⁴⁷ arguably goes one step further. In *Kasser*, the SEC brought an action against a Canadian corporation, an American corporation, and their controlling shareholder.¹⁴⁸ The only victim of the alleged fraud was a Canadian corporation and the fraudulent scheme had a limited, if any, impact on domestic markets.¹⁴⁹ Nevertheless, the Third Circuit held that the defendant's conduct in the United States provided a sufficient basis for subject matter jurisdiction.¹⁵⁰ Specifically, the court concluded that "the federal securities laws . . . grant jurisdiction in transnational securities cases *where at least some activity designed to further a fraudulent scheme occurs within this country.*"¹⁵¹

145. *Id.* at 595. The Third Circuit refused to provide a complete analysis of the extraterritorial issue, noting that "[b]ecause the difficulties inherent in any attenuation of jurisdiction are not seriously implicated in the circumstances of this case, we do not believe it desirable to discuss at length the transnational scope of the federal securities laws." *Id.* (footnote omitted). Moreover, it concluded that "[w]herever the jurisdictional line is to be drawn," the facts in *Straub* indicated that jurisdiction existed "under either the Second Circuit's formulation or that of the ALI Proposed Federal Securities Code." *Id.*, citing ALI FED. SEC. CODE § 1604 (Tent. Draft No. 3, 1974).

146. 540 F.2d at 595.

147. 548 F.2d 109 (3d Cir. 1977).

148. *Id.* at 110. Defendant Kasser controlled a Canadian corporation, Churchill Forest Industries (CFI), and a Delaware corporation, River Sawmills Company (River). *Id.* at 111. According to the SEC, Kasser fraudulently induced a corporation which was wholly owned by the province of Manitoba, Canada—Manitoba Development Fund (Fund)—to make loans to CFI and River. *Id.* at 110-11. In addition, the Fund purchased CFI and River debentures in reliance upon Kasser's misrepresentations. *Id.* at 111. Kasser's alleged misrepresentations consisted primarily of a promise that in return for the loans and debenture sales, he would invest additional equity capital in CFI and River. *Id.* Instead of making the promised investments, however, Kasser allegedly circulated the proceeds, using the Fund's money to make the required additional investments. *Id.* The fraud was accomplished by "laundering" the loan proceeds through corporations and bank accounts in the United States, Canada, and Switzerland. *Id.* Moreover, Kasser was alleged to have diverted some of the loan proceeds to his own personal use. *Id.* As a result of the aforementioned scheme, CFI and River went bankrupt. *Id.*

149. *Id.* at 110, 112.

150. *Id.* at 114-15. The activities conducted in the United States included

(1) various negotiations; (2) execution of one of the investment contracts in New York; (3) utilization of the instrumentalities of interstate commerce (e.g., telephones and mails) to further the scheme; (4) incorporation of defendant companies in the United States, or at least the establishment of corporate offices; and (5) use of the New York office of a Swiss bank as a conduit for moneys received from the Fund. Other activities . . . included (1) maintenance of books and records in this country; (2) drafting of agreements executed elsewhere; and (3) transmittal of proceeds from the transactions to and from the United States.

Id. at 111 (footnotes omitted). Notably, the district court had stated "that the intranational conduct of the defendants here consisted merely of 'miscellaneous acts'" and dismissed the SEC's claim based upon a lack of subject matter jurisdiction. *Id.* at 112, quoting *SEC v. Kasser*, 391 F.Supp. 1167, 1176 (D.N.J. 1975).

151. 548 F.2d at 114 (emphasis added).

The *Kasser* court relied upon *Straub*, *IIT*, and *Bersch* to support its conclusion.¹⁵² Although the court recognized that *Straub* was distinguishable in that *Straub* involved the securities of an American corporation and the domestic activities of the *Straub* defendants may have been greater, the Third Circuit concluded that *Straub* at least stood for the proposition that "conduct in this country, standing alone, is enough for jurisdiction to attach under the federal securities laws."¹⁵³ Proceeding under the "conduct theory,"¹⁵⁴ the court reasoned that it was not a condition precedent to statutory liability that the fraud be accomplished.¹⁵⁵ Moreover, it determined that the defendants' activities in the United States were sufficient to satisfy the Second Circuit's requirement that the defendant's conduct go beyond "mere preparation."¹⁵⁶

Perhaps the most significant aspect of the Third Circuit's opinion in *Kasser* was its treatment of the prior decisions of the Second Circuit. While recognizing that *IIT* and *Bersch* were the leading cases on the issue of jurisdiction with respect to transnational securities fraud, it appears that the *Kasser* court did not accord substantial weight to the express limitations of these decisions.¹⁵⁷ With respect to the *IIT* limitation that jurisdiction based upon conduct in the United States extends only when the "perpetration of the fraudulent acts themselves" occur in this country,¹⁵⁸ the Third Circuit responded that it was more significant that the domestic activities of *Kasser* went beyond "mere preparation."¹⁵⁹

Similarly, although the domestic activities engaged in by the defendants in *Kasser* were analogous to those involved in *Bersch*,¹⁶⁰ in which jurisdiction over the claims of the foreign plaintiffs was denied,¹⁶¹ the Third Circuit distinguished the cases. Specifically, the court found that "the execution of a key investment contract in New York as well as the maintenance of the

152. *Id.* at 115.

153. *Id.* at 113 (footnote omitted).

154. See note 44 and accompanying text *supra*. The "conduct theory" is based upon the right of a state, under the principles of international law, to regulate conduct within its territory regardless of where the consequences of that conduct occur. *Id.* See also note 46 *supra*.

155. 548 F.2d at 114. The Third Circuit adopted a very expansive view of the scope of the federal securities laws when it noted: "The securities acts expressly apply to 'foreign commerce,' thereby evincing a Congressional intent for a broad jurisdictional scope for the 1933 and 1934 Acts." *Id.* (footnote omitted). It may be significant, however, that the Third Circuit was not confronted with a private damage action in *Kasser*. *Id.* at 114 n.22.

156. *Id.* at 115.

157. See *id.* at 113-15.

158. *Id.* at 114, quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975).

159. 548 F.2d at 114-15. The Third Circuit relied in part on the *IIT* court's statement that it did "not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent securities devices for export, even when these are only peddled to foreigners." *Id.*, quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975). See text accompanying note 139 *supra*. It appears significant that the *Kasser* court never focused upon the fact that the fraud itself was not committed in the United States as required by *IIT*. 548 F.2d at 114-15. See note 140 & 141 and accompanying text *supra*.

160. See notes 123 & 150 *supra*.

161. For a discussion of *Bersch*, see notes 114-32 and accompanying text *supra*.

records in this country by both American and foreign corporations" were examples of greater United States based conduct.¹⁶² Finally, the Third Circuit concluded that "[f]rom a policy perspective . . . we believe that there are sound rationales for asserting jurisdiction."¹⁶³

C. Other Judicial Decisions

In addition to the major decisions of the Second and Third Circuits, three other circuit courts of appeals have decided cases involving the extra-territorial application of the securities laws.¹⁶⁴ Despite the varying factual postures of these cases, the general principles announced and developed by the Second Circuit were substantially followed.

In a recent decision, the United States Court of Appeals for the Fifth Circuit held that subject matter jurisdiction existed under the antifraud provisions of the 1933 Act despite the fact that only European investors were

162. 548 F.2d at 115. The Third Circuit rejected the defendant's argument that its activities in the United States did not directly cause the losses to the foreign corporation, as required by *Bersch*. *Id.* See notes 122 & 123 and accompanying text *supra*.

The Third Circuit concluded that "it is evident that the defendants' conduct occurring within the borders of this nation was essential to the plan to defraud the Fund." 548 F.2d at 115.

163. 548 F.2d at 116. The Third Circuit noted three policy considerations which supported its conclusions. *Id.* First, the court cautioned that should it deny jurisdiction, defrauders would be encouraged to use the United States as a base for fraudulent schemes. *Id.* Second, it was suggested that "a holding of no jurisdiction might induce reciprocal responses on the part of other nations." *Id.* Finally, the Third Circuit reasoned that the purpose of the securities laws—to provide a high standard of conduct in securities transactions—would be served by an affirmative finding of jurisdiction since such a determination would "enhance the ability of the SEC to police vigorously the conduct of securities dealings within the United States." *Id.*

164. See notes 165-69 and accompanying text *infra*. In addition to the district court decisions in the Second and Third Circuits discussed previously, see notes 94, 132 & 142 *supra*, at least two other district courts have examined the issue of the extraterritorial scope of the securities laws. See *Garner v. Pearson*, 374 F.Supp. 591 (M.D. Fla. 1974); *SEC v. Gulf Intercontinental Fin. Corp.*, 223 F. Supp. 987 (S.D. Fla. 1963). While recognizing that "[s]ection 10(b) was not intended to impose rules of conduct on transactions occurring outside the United States when the only connection with the United States is the citizenship of the purchaser or seller," the *Garner* court nevertheless sustained a jurisdictional claim by liquidators of a Bahamian bank on the ground that the fraudulent scheme had a significant impact on American investors. *Garner v. Pearson*, 374 F. Supp. at 599. The scheme involved a complex set of transactions which were designed to appropriate the assets of the bank to the personal use and benefit of its former officers and directors. *Id.* at 594-95. The district court noted that the significant impact on American investors was evidenced by the fact that 50% of the bank's depositors were American citizens, instrumentalities of interstate commerce were utilized, and some of the fraudulent transactions in the scheme took place in the United States. *Id.* at 599.

As in *Garner*, the district court in *Gulf Intercontinental* ruled affirmatively on a jurisdictional claim. *SEC v. Gulf Intercontinental Fin. Corp.*, 223 F. Supp. at 994-95. In *Gulf Intercontinental*, the SEC sought an injunction against the Canadian defendant to prevent further violations of the antifraud provisions of the securities laws. *Id.* at 989. The court concluded that jurisdiction existed since numerous offers had been made within the United States by means of newspaper advertisements. *Id.* at 994. The district court reasoned that "[i]t is sufficient for subject matter jurisdiction under the Acts that such offers be made within the United States without a showing that such offers were accepted by actual sale, or that the alleged misrepresentations were in fact successful in inducing the sale of such securities by reliance thereon." *Id.* at 994-95 (footnotes omitted).

defrauded.¹⁶⁵ The court based its conclusion upon the defendant's conduct within the United States.¹⁶⁶ Similarly, the United States Court of Appeals for the Eighth Circuit has found a defendant's conduct within the United States dispositive in an antifraud claim brought by American plaintiffs against a Canadian corporation.¹⁶⁷ Unlike the Fifth and Eighth Circuits, the United States Court of Appeals for the Ninth Circuit has decided cases in which both the "conduct"¹⁶⁸ and the "effects"¹⁶⁹ theories were at least partially utilized to sustain subject matter jurisdiction.

165. *United States v. Cook*, 573 F.2d 281, 283 (5th Cir.), *cert. denied*, 99 S. Ct. 119 (1978). Cook was convicted by the lower court for violating the antifraud provisions of the 1933 Act and the federal mail fraud statutes. 573 F.2d at 282. His conviction resulted from a scheme in which European investors received false advertisements in Europe extolling the virtues of American oil investments. *Id.* Once the European investor purchased an interest, a contract was signed in Europe and returned to the United States for recording. *Id.* at 283. Proceeds received from later investors were used to pay off earlier investors under the guise that the investments were producing a return. *Id.* Eventually, the entire scheme collapsed. *Id.*

166. 573 F.2d at 283 & n.4. Noting that schemes with marginal American connections raised difficult questions with respect to jurisdiction, the Fifth Circuit concluded that it would "leave for another day an attempt to formulate the outer perimeter of American jurisdiction. The present scheme is so far within the jurisdiction of the American courts as to give us little pause." *Id.* at 283. The conduct relied upon by the court in concluding that it had jurisdiction over the case included the following activities: 1) Cook formulated and conducted his scheme from Dallas, Texas; 2) his actions in Texas were hardly preparatory; 3) American securities were involved in the scheme; 4) the money for the scheme was repatriated; and 5) some investors were defrauded in the United States. *Id.*

167. *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973). In *Travis*, a class action was brought by shareholders of a Canadian corporation, alleging fraud in a tender offer by another Canadian corporation. *Id.* at 518. The shareholders were American citizens who resided in the United States. *Id.* The plaintiffs alleged that they were led to believe that if they retained their stock until after a tender offer was made to Canadian shareholders, the corporation would make them a similar offer. *Id.* at 519. The subsequent offer was never made, and the plaintiffs were allegedly injured when they were forced to sell their shares at a lower price than they would have received had they sold when the initial tender offer was announced. *Id.* The Eighth Circuit stated that the "essential issue . . . [was] whether the defendants' conduct in the United States was of such significance to subject them to the jurisdiction of the District Court." *Id.* at 524. Relying on *Leasco*, the court answered the question affirmatively, and cited the following domestic activity: 1) a letter mailed by the President of the corporation to the American shareholders assuring them that although the tender offer was being restricted to Canadian shareholders, their investment position would be protected; 2) a copy of this same letter mailed to the plaintiffs' attorney; 3) phone calls made by the plaintiffs from St. Louis to the corporate officers in Canada during which the alleged subsequent tender offer was discussed; 4) phone conversations between the plaintiffs' attorney and an officer of a New Jersey based subsidiary of the defendant corporation regarding tax handling of the subsequent offer; 5) a letter mailed from Canada to St. Louis assuring the plaintiffs that the tax aspects of the exchange were being examined; 6) a phone call from Canada to St. Louis informing the plaintiffs that the subsequent tender offer would not be made and that the plaintiffs would have to sell their shares to the corporation which had gained control as a result of the tender offer, or the corporation would withdraw its support of the market for the stock; and 7) the subsequent sale of the plaintiffs' stock in St. Louis. *Id.* at 524-26.

168. *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973). The SEC charged United Financial Group, Inc. with violating §§ 5(a), 5(c), and 17(a) of the 1933 Act, § 10(b) of the 1934 Act, and rule 10b-5. *Id.* at 356 n.2. The alleged fraudulent activity arose within the context of the offer and sale of shares in mutual funds of various investment companies incorporated in foreign countries. *Id.* at 355-56. Although the defendants argued that the offers and sales had been confined to foreign purchasers, the court found evidence to the contrary. *Id.* at 356. Specifically, the defendants' conduct which the Ninth Circuit found controlling included: 1)

D. *The Private Offering Exemption*

Although section 5 of the 1933 Act may apply to foreign offerings of securities, a few judicial and administrative decisions¹⁷⁰ have indicated that, in some circumstances, a foreign offering of securities might be exempt from the registration requirements as a transaction "not involving any public offering."¹⁷¹ Illustrative of this result is the decision by the United States District Court for the Southern District of New York in *SEC v. North American Research & Development Corp.*¹⁷²

In *North American*, the court confronted an elaborate scheme which was designed to defraud American investors.¹⁷³ A major aspect of the

the sale of shares to an American serviceman overseas; 2) the sale of shares to an American citizen temporarily living abroad; 3) the sale of shares to an American citizen employed overseas without informing her of purchase restrictions; 4) the offer to exchange shares made to an American citizen and addressed to his residence in the United States; 5) the control of the foreign companies by a United States corporation; and 6) the use of the mails and other facilities of interstate commerce to arrange meetings and to prepare and distribute prospectuses. *Id.* Despite this partial reliance on the defendants' conduct, the Ninth Circuit also noted the significant "effect" that those activities had on American investors. *Id.* at 357. The court thus appears to have relied on both the "conduct" and "effect" theories. *Id.* at 356-57.

169. *Des Brisay v. Goldfield Corp.*, 549 F.2d 133 (9th Cir. 1977). In *Des Brisay*, the foreign plaintiffs brought a class action alleging fraudulent conduct in the takeover of a Canadian corporation by an American corporation. *Id.* at 134, 136. The named plaintiffs included a Canadian citizen, who was a former shareholder of the Canadian corporation, and a Canadian trust company. *Id.* at 134. In substance, the questioned transaction involved the exchange of the American corporation's shares for the assets of its Canadian counterpart. *Id.* at 135. The Ninth Circuit reasoned that the "Securities Acts . . . [have] been held to embrace the protection of [the] 'domestic securities market from the effects of improper foreign transactions in American securities.'" *Id.*, quoting *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), modified on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969). The *Des Brisay* court therefore concluded that subject matter jurisdiction was appropriate since the defendant's stock was listed and traded on an American exchange and the foreign transaction adversely affected "not only the plaintiffs but also the American market in that corporation's securities." 549 F.2d at 135. The court reasoned that such a result was necessary in order to "protect the integrity of the domestic securities markets in a particular stock." *Id.*

170. See generally *SEC v. Mono-Kearsarge Consol. Mining Co.*, 167 F. Supp. 248, 255-56 (D. Utah 1958) (transfer of shares to limited number of Canadian residents did not bring offering within private placement exemption where defendants maintain view toward public distribution in United States); *In re Morris Mac Schwebel*, 40 S.E.C. 347, 366 (1960) (no exemption available where unregistered shares were sold to European investors who intended to resell them in United States).

171. 15 U.S.C. § 77(d)(2) (1976). See note 18 and accompanying text *supra*.

172. 280 F. Supp. 106, 123 (S.D.N.Y. 1968), *aff'd in part and vacated in part on other grounds*, 424 F.2d 63 (2d Cir. 1970).

173. 280 F. Supp. at 112-20. The primary objective of the scheme was for the promoter to gain control of a "shell" corporation and market its shares on the over the counter market. *Id.* at 112. Prior to the promoter's acquisition of control, the shell corporation's transfer agent, who was also a director and the shell corporation's secretary-treasurer, purchased shares from a number of the corporation's shareholders. *Id.* at 115. These shares, along with 200,000 shares acquired at the time control was transferred, were sold to other participants in the scheme, who transferred them immediately to Canadian brokers. *Id.* A similar procedure was employed for an additional 553,000 shares that were purchased from shareholders of the "shell" corporation after the promoter had acquired control. *Id.* Once the shares were "safely" in Canada, the promoter and his associates created a demand for the "shell" corporation's stock by publishing false "progress reports" in the United States. *Id.* at 117-19. Ultimately, the shares were sold in the United States to American investors. *Id.* at 118-20.

scheme was the distribution of unregistered shares to Canadian brokers followed by a redistribution of the shares in the United States.¹⁷⁴ Some of the defendants advanced the argument that "since they sold North American shares to . . . [Canadian brokers] in Toronto, Canada, they . . . [were] entitled to an exemption on the ground that the shares were purchased solely with a view toward distribution into Canada."¹⁷⁵ Rejecting this contention, the district court noted that

[w]here an offering is made to persons *exclusively* outside of the United States, it is exempt from § 5 because § 4(1) [now § 4(2)] exempting transactions "not involving any public offering" had as its purpose to *require registration only as to those public offerings that were made in the United States*. . . . On the other hand, where an offering is made to dealers outside the United States *who are purchasing with a view to distribution into the United States, or into both the United States and Canada, the exemption is inapplicable*.¹⁷⁶

Since the court found that the evidence clearly indicated that the Canadian brokers purchased the shares with a view toward distribution in the United States, the defendants could not utilize the private offering exemption.¹⁷⁷

V. THE FEDERAL SECURITIES CODE

In an effort to reform and modify existing securities regulation,¹⁷⁸ the American Law Institute has drafted and proposed the adoption of a Federal Securities Code.¹⁷⁹ The pertinent provision addressing the extraterritorial scope of the Code is section 1905,¹⁸⁰ a subsection of which defines the general conditions under which the substantive provisions of the Code operate.¹⁸¹ The broad reach of section 1905(a), however, is limited by the exceptions to jurisdiction enumerated in section 1905(b).¹⁸² Moreover, section 1905(c) grants the SEC rulemaking authority to provide for the applicability or inapplicability of the Code in specific instances.¹⁸³ Finally, the remainder of section 1905 deals with foreign bribes,¹⁸⁴ consent to personal jurisdiction,¹⁸⁵ and actions in foreign courts.¹⁸⁶

174. *Id.* at 115-20.

175. *Id.* at 123.

176. *Id.* (citations omitted) (emphasis added).

177. *Id.*

178. See note 14 *supra*.

179. ALI FED. SEC. CODE (Proposed Official Draft March 1978) [hereinafter cited as CODE].

180. *Id.* § 1905.

181. *Id.* § 1905(a).

182. *Id.* § 1905(b). See notes 194-96 and accompanying text *infra*.

183. CODE, *supra* note 179, § 1905(c). See notes 199-207 and accompanying text *infra*.

184. CODE, *supra* note 179, § 1905(d). This section of the Code is similar to the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (to be codified at 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff, 78q(b)).

185. CODE, *supra* note 179, § 1905(e).

186. *Id.* § 1905(f).

The principal approach of the Code is to provide for a broad grant of jurisdiction while relying on the SEC to promulgate rules "to tailor [the] expression of power to the appropriate policy considerations."¹⁸⁷ All grants of authority are therefore limited solely by principles of international law.¹⁸⁸ Within this limitation, the Code provides specific jurisdictional grants with respect to offers, sales, and purchases of securities; inducements not to buy or sell a security; proxy solicitations and other circulars sent to security holders; tender offers and recommendations for or against tender offers; and activities of investment advisors—as long as the aforementioned conduct takes place within the United States even though it is initiated outside of the United States.¹⁸⁹ In addition, the antifraud provisions of the Code apply to these activities even if the act "is initiated within the United States although it occurs outside the United States."¹⁹⁰ Finally, the Code restates international law principles by providing for jurisdiction in cases where

any other prohibited, required, or actionable conduct (i) whose constituent elements occur to a substantial (but not necessarily predominant) extent within the United States or (ii) some or all of whose constituent elements occur outside the United States but cause a substantial effect within it (of a type that this Code is designed to prevent) as a direct and reasonably foreseeable result of the conduct.¹⁹¹

Although much of the Code is similar to the existing law on subject matter jurisdiction as interpreted by the courts,¹⁹² there are two major

187. ALI FED. SEC. CODE § 1604, Comment 1(c), at 164-65 (Tent. Draft No. 3, 1974) [hereinafter cited as THIRD DRAFT]. Section 1604 was the predecessor to § 1905 of the Proposed Official Draft. Except for some minor changes made in the Fifth Draft, both sections contain the same language. The comments accompanying the Third Draft would therefore appear to be directly applicable to an analysis of § 1905. Moreover, the comments accompanying the Third Draft provide the only discussion of the objectives of the extraterritoriality provision.

According to the drafters, the Code's approach to the extraterritoriality issue "recognizes that it is essential to distinguish between *power* in the international law sense and *policy*." *Id.* at 164 (emphasis in original). Among the policies addressed in the comments is the "risk . . . that excessive extraterritoriality might damage the country's trade position." *Id.*, Comment 10(a), at 170.

188. See CODE, *supra* note 179 §§ 1905(a)-(c). The drafters noted that a possible approach to the extraterritoriality issue was to retain the current statutes' approach by adopting language similar to § 30 of the 1934 Act. THIRD DRAFT, *supra* note 187, § 1604, Comment 1(a), at 160. The drafters rejected this suggestion, however, noting that § 30 is "both equivocal and illogical." *Id.* at 161. At least one commentator has applauded the drafter's decision not to follow § 30. See Karmel, *supra* note 4, at 672.

189. CODE, *supra* note 179, § 1905(a)(1)(A). The drafters note that "[p]resumably everyone would agree that the making of an offer from another country into the United States by mail or telephone is subject to . . . §§ 5 and 17(a) even though neither the seller nor an agent of the seller sets foot in the United States." THIRD DRAFT, *supra* note 187, § 1604, Comment 3(b), at 165 (citations omitted). They reach the same conclusion with respect to proxy solicitations and tender requests. *Id.*, Comment 3(c), at 166.

190. CODE, *supra* note 179, § 1905(a)(2).

191. *Id.* § 1905(a)(1)(D). See also THIRD DRAFT, *supra* note 187, § 1604, Comment 1(b), at 161-64.

192. See generally THIRD DRAFT, *supra* note 187, § 1604, Comment 1(c), at 161-69; Karmel, *supra* note 4, at 669-70.

changes which warrant discussion.¹⁹³ One major innovation provided by the Code is the enumeration of situations under which the Code's substantive provisions do not apply.¹⁹⁴ For example, except for its antifraud provisions, the Code does not apply to any of the acts listed in section 1905(a) when the act occurs outside the United States even though it was initiated within the United States.¹⁹⁵ Presumably, this provision removes from the purview of the Code most foreign distributions when the actual offer and sale are made outside of the United States.¹⁹⁶ This provision therefore represents a significant recognition by the drafters of the Code that the regulatory and disclosure functions of the securities laws do not require a like result in the area of extraterritorial application.¹⁹⁷ The courts have heretofore failed to make this crucial distinction under existing legislation.¹⁹⁸

A second major change made by the Code concerns the authority of the SEC to promulgate rules defining the Code's extraterritorial application.¹⁹⁹ Under current law, only sections 12(g)(3),²⁰⁰ 30²⁰¹ and 7(f)²⁰² of the 1934 Act provide for rulemaking authority in this area. None of these sections, however, is as broad as the Code provision.²⁰³ Under the Code, the SEC may generally adopt a rule providing for the applicability or inapplicability of

193. In addition to the two major changes discussed in the text, it is important to note that adoption of the Code's unitary approach to the securities laws would eliminate the need to examine numerous provisions of various statutes in order to resolve the extraterritoriality issue. The courts, however, have not found it necessary to distinguish between the securities laws on the issue of subject matter jurisdiction. See note 87 and accompanying text *supra*. Moreover, the Code specifically addresses situations in which the registration requirements would not apply to foreign brokers, dealers, and investment advisers. See CODE, *supra* note 179, § 1905(b)(2)-(3).

194. CODE, *supra* note 179, § 1905(b).

195. *Id.* § 1905(b)(1). Although the drafters conceded that international law principles would permit the United States to exercise jurisdiction in these situations, they concluded that "policy does not require that Part V [successor to the registration and prospectus provisions of the 1933 Act] extend as far as it might under international law." THIRD DRAFT, *supra* note 187, § 1604, Comment 4, at 167 (emphasis in original). Section 1604(b) was therefore "an elaboration of this policy, subject to rules that the SEC might provide otherwise under § 1604(c)(1) [§ 1905(c) of Proposed Official Draft]." *Id.*

196. See CODE, *supra* note 179, § 1905(b)(1).

197. *Id.* See also Karmel, *supra* note 4, at 695. It is interesting to note that the Code does not distinguish between Americans living abroad and foreign nationals for the purposes of § 1905(b)(1). Although the comments are silent on the issue, the Code appears to depart from the SEC's position that registration is required when offers are made to Americans living abroad. For a discussion of the SEC's position, see Release 4708, *supra* note 10, ¶ 1362, at 2124. Of course, the SEC could always adopt a rule pursuant to § 1905(c) of the Code in order to maintain its current position. See CODE, *supra* note 179, § 1905(c). But see THIRD DRAFT, *supra* note 187, § 1604, Comment 10(f), at 173-74 (mere nationality of victim is insufficient basis for exercise of jurisdiction under international law principles).

198. See note 87 and accompanying text *supra*.

199. See CODE, *supra* note 179, § 1905(c).

200. 15 U.S.C. § 78o (1976).

201. *Id.* § 78dd.

202. *Id.* § 78g.

203. See THIRD DRAFT, *supra* note 187, § 1604, Comment 1, at 160-65. Section 12(g)(3) authorizes the SEC to exempt, by rule, foreign issuers from the registration requirements of the 1934 Act. 15 U.S.C. § 78o (1976). Section 7(f) permits the Board of Governors of the Federal Reserve System to exempt foreigners from the application of the 1934 Act's margin requirements. *Id.* § 78g. For a discussion of § 30, see notes 98-101 and accompanying text *supra*.

any provision of the Code.²⁰⁴ The only limitation on its power is that the rule be "[w]ithin the limits of international law . . . and in the light of the significance . . . within the United States of particular acts or conduct."²⁰⁵ While current judicial decisions indicate that the mere nationality of the defendant is not a sufficient basis for the exercise of jurisdiction under the securities laws,²⁰⁶ the Code would permit the SEC to promulgate a rule which would produce such a result.²⁰⁷

VI. DISCUSSION—POSSIBLE SCOPE OF SECTION 5

In light of the varying factual patterns presented in the cases, it is difficult to reach firm conclusions as to the extraterritorial reach of the 1933 Act's registration requirements. Whatever guidance is provided by the decisions is limited by two important considerations. First, no court has examined the extraterritoriality issue when the sole question was registration. Most courts have focused upon the egregious conduct of the defendant with respect to the antifraud provisions of the securities laws.²⁰⁸ As a result, there has been little discussion of the policies for or against extending the registration requirements into the area of transnational securities transactions. Since the extraterritoriality issue is primarily one of policy,²⁰⁹ varying considerations might operate to produce different results.²¹⁰

Even if the case law is determinative of the extraterritorial reach of section 5, a second consideration must be noted. The Third Circuit's recent

204. CODE, *supra* note 179, § 1905(c). In addition, the Code provides that the SEC shall enact rules to determine the extent to which the "issuer registration" provisions of the Code apply to foreign issuers. *Id.* § 1905(c)(2).

205. *Id.* § 1905(c). The drafters noted that "§ 1604(c)(1) does not give the . . . [SEC] a completely free hand. Since its rules must be consistent with . . . international law . . . they will not bind the courts if they plainly go beyond international law." THIRD DRAFT, *supra* note 187, § 1604, Comment 10(e), at 172. As an example, the drafters noted that "the mere nationality of the victim as distinct from the actor is not enough according to the *Restatement*." *Id.*, Comment 10(f), at 173-74, *citing* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). Nevertheless, the drafters concluded that since "international law . . . [is] frequently at least as vague as the domestic variety, the courts may be expected to defer within reason to definitional rules designed to flesh out § 1604(a) and (b) [now §§ 1905(a),(b)], especially § 1604(a)(1)(D) [now § 1905(a)(1)(D)], in the context of the securities world." THIRD DRAFT, *supra* note 187, § 1604, Comment 10(e), at 172-73.

206. See note 136 and accompanying text *supra*.

207. See THIRD DRAFT, *supra* note 187 § 1604, Comment 10(f), at 173. At least one commentator criticized the Code's extraterritoriality provisions while they were in draft stage. See Karmel, *supra* note 4, at 670. The criticisms focused upon the drafters' failure to resolve the question of "what the United States public policy is or should be in applying federal securities laws to activities in foreign countries." *Id.* Specifically, the author questioned the broad rulemaking authority delegated to the SEC, contending that the agency lacks the expertise "to be the arbiter of the extent to which the securities laws will be given extraterritorial application." *Id.* While the SEC views public policy from the vantage point of the public investor, Ms. Karmel noted that "[i]n the transnational and international security markets . . . public policy should be viewed in the context of foreign and international monetary policy objectives." *Id.*

208. See notes 83-169 and accompanying text *supra*.

209. See SEC v. Kasser, 548 F.2d 109, 116 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); THIRD DRAFT, *supra* note 187, § 1604, Comment 1(c), at 164.

210. See Karmel, *supra* note 4, at 670, 691-95.

decision in *Kasser* appears to signify a more expansive approach to the application of the securities laws.²¹¹ It remains to be seen whether other courts will accept the Third Circuit's analysis²¹² in lieu of the more limited approach adopted by the Second Circuit.²¹³ If accepted, the *Kasser* opinion may be the judicial vehicle by which the SEC's expansive view of the reach of the securities laws is recognized.²¹⁴

Despite these qualifications, it is possible to identify major areas wherein the applicability of the registration requirements of section 5 can be determined. Under any view, it seems clear that an offer or sale of securities in the United States would fall within the purview of section 5 and, therefore, require registration unless an exemption is available.²¹⁵ This result appears true regardless of whether the issuer is domiciled in the United States or is a foreign based enterprise.²¹⁶ Moreover, registration would be required even though the purchaser is a foreign national who is living in or visiting the United States. In such a situation, jurisdiction would be based primarily upon the defendant's conduct, *i.e.*, the offer or sale, within the United States.²¹⁷

Unlike distributions in the United States, it is more difficult to predict when registration is required for distributions made outside the country. Both the SEC and the courts appear to agree that the primary focus of the securities laws is on the protection of American investors.²¹⁸ It would therefore appear as though the residency and nationality of the purchaser are the most important factors. Significantly, the courts have utilized the same analytical approach regardless of whether the SEC brings suit or the plaintiff is an individual purchaser.²¹⁹

211. For a discussion of *Kasser*, see notes 147-63 and accompanying text *supra*. See also *Loomis & Grant*, *supra* note 2, at 10-11; 8 SETON HALL L. REV. 795 (1978).

212. For a statement of the Third Circuit's conclusion in this area, see text accompanying note 151 *supra*.

213. For a summary of the limitations adopted by the Second Circuit, see notes 130, 132, 136 & 140 and accompanying text *supra*.

214. See text accompanying notes 55-57 *supra*. See also *Karmel*, *supra* note 4, at 694; *Loomis & Grant*, *supra* note 2, at 17-18.

215. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *SEC v. Gulf Intercontinental Fin. Corp.*, 223 F. Supp. 987 (S.D. Fla. 1963); *THIRD DRAFT*, *supra* note 187, § 1604, Comment 3(b), at 165.

216. See *SEC v. Gulf Intercontinental Fin. Corp.*, 223 F. Supp. 987 (S.D. Fla. 1963); notes 102-10 and accompanying text *supra*.

217. See notes 133-41 and accompanying text *supra*. See also *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). If the offer and/or sale were made in the United States to a foreigner who then returned to his country and subsequently received the security, the exercise of jurisdiction would still be appropriate. See notes 133-41 and accompanying text *supra*. Cf. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (question of sales to foreigners within the United States left open but analysis suggests that jurisdiction would be appropriate).

218. See notes 58-60, 132 & 137 and accompanying text *supra*. See also *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973). But see *SEC v. Kasser*, 548 F.2d 109, 114-16 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

219. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017-18 (2d Cir. 1975). But see *Loomis & Grant*, *supra* note 2, at 10-11, 18-19. It is also arguable that the *Kasser* court applied a less

Registration appears to be required in all cases where sales are made to Americans residing in the United States so long as the issuer is engaged in interstate commerce.²²⁰ Arguably, it may not be a defense that the actual offer and sale was completed outside the country, since jurisdiction may be premised upon the direct effect in the United States caused by the defendant's conduct abroad.²²¹ On the other hand, where the purchasers are Americans living abroad, subject matter jurisdiction exists only if there is some measure of conduct in the United States.²²² Theoretically, if the entire distribution could be structured outside of the United States, registration may not be required. The conduct required by the courts when the purchaser is a nonresident American is not substantial, however, and it appears to include most activities leading up to the offer and/or sale without registration.²²³

It is therefore submitted that most, if not all, domestic issuers would probably satisfy the conduct requirement since limited activities in corporate headquarters may be enough to sustain jurisdiction.²²⁴ In contrast, a

stringent standard to the SEC action before it because the Commission was seeking injunctive relief. See *SEC v. Kasser*, 548 F.2d 109, 114 n.22 (3d Cir.), cert. denied, 431 U.S. 938 (1977).

220. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 990-93 (2d Cir.), cert. denied, 423 U.S. 1018 (1975). The interstate commerce requirement is liberally construed in order to fulfill the remedial purpose of the statute. See *United States v. Wolfson*, 405 F.2d 779, 783-84 (2d Cir. 1968), cert. denied, 493 U.S. 946 (1969); *United States v. Hughes*, 195 F. Supp. 795 (S.D.N.Y. 1961). See generally *SEC v. United Financial Group, Inc.*, 474 F.2d 354, 357 & n.4 (9th Cir. 1973).

221. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 990-92, 993 (2d Cir.), cert. denied, 423 U.S. 1018 (1975); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), modified on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969). It should be noted that both *Bersch* and *Schoenbaum* may be distinguished from the situation in which an American citizen residing in the United States is sold a nonlisted domestic or foreign security outside the country and then transports the security with him when he returns home. In *Bersch*, the defendants had engaged in some conduct in the United States, whereas the hypothetical presupposes no conduct in this country. Although the *Schoenbaum* court permitted an action where there was no United States based conduct, the security was listed on an American exchange, another factor absent from the above hypothetical. Nevertheless, it is submitted that the "direct effect" theory would support jurisdiction in the hypothetical even in the absence of conduct in this country, since the United States clearly has an "interest" in protecting Americans residing at home. See note 127 and accompanying text *supra*. See also *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973). But see *Karmel*, *supra* note 4, at 682-85; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) (1965) (state does not have jurisdiction to prescribe conduct of alien simply because its conduct affects one of state's nationals). For an excellent discussion of the problems in this area, see *Williams*, *supra* note 4, at 327-51. This article demonstrates the problems that foreign issuers encounter with American shareholders with respect to the offer of subscription rights. *Id.* at 335-40. The commentator notes the possibility that although subject matter jurisdiction may exist, such subscription offerings may be treated as private placements. *Id.* at 337-38.

222. See notes 130-32 and accompanying text *supra*.

223. *Id.*

224. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 992 (2d Cir.), cert. denied, 423 U.S. 1018 (1975). The Second Circuit described the amount of the requisite conduct in various ways. 519 F.2d at 992-93. First, it stated that "merely preparatory acts" are not enough. *Id.* at 992. See text accompanying notes 121-23 *supra*. The court also noted that the conduct of the defendant must be of "material importance." 519 F.2d at 993. Finally, the Second Circuit concluded that

foreign issuer may be able to structure its offering so as to avoid registration. If the security involved is listed on an American exchange, however, additional uncertainty exists as to whether this factor would be sufficient to require registration.²²⁵

With respect to foreign plaintiffs, however, the SEC's position as to the scope of the 1933 Act appears questionable. As previously noted, the SEC has concluded that the 1933 Act "might be construed to encompass virtually any offering of securities made by a United States corporation to foreign investors."²²⁶ The courts, however, appear to take a more limited view with respect to the securities laws in general. Indeed, the Second Circuit has specifically noted that the application of the securities laws is not determined solely by the nationality of the defendant.²²⁷

Furthermore, in analyzing the registration requirements vis-a-vis foreign investors, it is important to recognize the divergent opinions in the circuits. According to the Second Circuit, the prohibited conduct must occur in the United States for the court to have jurisdiction.²²⁸ It would thus appear that registration would be required only if the offer or sale to the foreign investor took place in the United States. As a result, it would seem relatively easy for an American or foreign issuer to structure its offerings to

Congress surely did not mean the securities laws to protect the many thousands of Americans residing in foreign countries against securities frauds by foreigners acting there, and we see no sufficient reason to believe it would have intended otherwise simply because an American participated so long as he had done nothing in the United States.

Id. at 992.

225. The Second Circuit has noted that Congress intended the securities laws to protect "domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities." *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *modified on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969). Numerous courts have cited *Schoenbaum* for this principle. *See, e.g.*, *Des Brisay v. Goldfield Corp.*, 549 F.2d 133, 135 (9th Cir. 1977); *United States v. Clark*, 359 F. Supp. 131, 133-34 (S.D.N.Y. 1973).

With respect to the statement in *Schoenbaum* concerning the protection of the American securities market, at least one court has stated that "obviously Congress intended jurisdiction over American securities regardless to whom the securities are sold." *United States v. Cook*, 573 F.2d 281, 283 (5th Cir.), *cert. denied*, 99 S. Ct. 119 (1978). It may therefore be argued that where listed securities are involved, registration is required in order to protect the domestic securities markets. *See* note 12 and accompanying text *supra*. It is unclear, however, whether this theory would follow directly from noncompliance with § 5 since it is difficult to determine the negative impact, if any, that results from nonregistration. Specifically, in fraud cases, the value of the security might be affected, which may have an adverse impact upon the domestic securities markets and result in economic injury to investors. This need not be the case when an issuer simply fails to register. It is therefore submitted that the fact that a listed security is involved should *not* automatically satisfy the requirements of subject matter jurisdiction.

226. Release 4708, *supra* note 10, at ¶ 1362, at 2124. *See* notes 52-57 and accompanying text *supra*.

227. *See* note 136 and accompanying text *supra*.

228. *See* note 140 and accompanying text *supra*. *See also* *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co.*, 400 F. Supp. 1219, 1223 (S.D.N.Y. 1975). The Fifth Circuit has held that a defendant's conduct satisfied the Second Circuit's formulation and that the United States Government could initiate criminal proceedings resulting from a fraud upon European investors. *United States v. Cook*, 573 F.2d 281, 283 (5th Cir.), *cert. denied*, 99 S. Ct. 119 (1978).

ensure against such a result.²²⁹ On the other hand, the Third Circuit would permit a foreign investor to sue if "some activity designed to further . . . [the prohibited conduct] occurs within this country."²³⁰ While this latter standard appears less onerous to the investor, it is difficult to predict the manner in which it would operate in a case in which the sole issue is registration.²³¹ Moreover, a court in either circuit still has the option to adopt the position that although the distribution is within the extraterritorial reach of section 5, a distribution solely for foreign investors in a foreign country is exempt under the "nonpublic offering" statutory exemption.²³²

Finally, it should be recognized that the registration concerns of foreign offerings are not confined to traditional primary distributions.²³³ To the contrary, secondary distributions are also subject to the 1933 Act's registration requirements.²³⁴ While it is far from clear how such cases might be

229. For examples of stock transactions structured outside the United States, see *Finch v. Marathon Sec. Corp.*, 316 F. Supp. 1345 (S.D.N.Y. 1970); *Kook v. Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960).

230. *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.), cert. denied, 431 U.S. 938 (1977). See text accompanying note 151 *supra*. See also *Straub v. Vaisman & Co.*, 540 F.2d 591 (3d Cir. 1976). But see *Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975).

231. There appears to be an argument that *Kasser* should be limited to SEC injunctive actions. See *SEC v. Kasser*, 548 F.2d 109, 114 n.22 (3d Cir.), cert. denied, 431 U.S. 938 (1977).

232. See *SEC v. North Am. Research & Dev. Corp.*, 280 F. Supp. 106, 123 (S.D.N.Y. 1968), *aff'd in part and vacated in part on other grounds*, 424 F.2d 63 (2d Cir. 1970).

233. For example, the SEC has concluded that foreign business combinations are subject to rule 145, which requires that a registration statement be filed whenever securities are exchanged in a merger, acquisition, or other business combination. See 17 C.F.R. § 230.145 (1978). Specifically, the SEC notes that compliance with rule 145 is required when "foreign issuers . . . [make] offers or sales of securities to United States investors, unless an exemption is available under the Securities Act." SEC Securities Act Release No. 5316, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,015 (Oct. 6, 1972). See also *The Burmah Oil Co.* (June 13, 1974). The SEC apparently believes that the jurisdictional grant under the 1933 Act is greater than that under the Act's 1934 counterpart. See SEC Securities Act Release No. 5316, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,015 (Oct. 6, 1972). Specifically, the SEC notes

that certain provisions under the . . . [1934] Act, and the rules promulgated thereunder, provide exemptions for foreign issuers from certain provisions of the . . . [1934] Act Similar exemptions for foreign issuers, however, do not appear in the . . . [1933] Act, and, in the Commission's opinion, *there is no statutory basis for affording such exemptions by rule*. The United States securities statutes were intended to protect United States investors who buy securities of foreign issuers, and the need for the protections afforded by registration is not diminished because the issuer has a foreign domicile.

Id. (emphasis added).

234. See *Pennaluna & Co. v. SEC*, 410 F.2d 861, 865 (9th Cir. 1969), cert. denied, 396 U.S. 1007 (1970) (presumptive need for registration extends to all secondary distributions not insignificant in size). Again, the issues regarding the effect of a foreign offering on secondary distributions span a wide range of factual situations. See *Hopkins*, *supra* note 4, at 308-22; *Williams*, *supra* note 4, at 327-51. For example, the issue arises as to whether restricted securities, as defined by rule 144, 17 C.F.R. § 230.144 (1978), are restricted for sale in foreign countries. Applying the principles discussed previously, it is submitted that even under the SEC's current policy, the shares would be freely distributable if the securities are sold *solely* to foreign investors with the necessary restrictions on resale into the United States. See *Genstar Ltd.*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,358 (Oct. 6, 1975) (primary purpose of rule 144 is to facilitate sales of relatively small amounts of restricted securities in the domestic markets of the United States); Release 4708, *supra* note 10, ¶¶ 1361-1362, at 2123-25 (registration not required where securities come to rest abroad). Moreover, if the offers and sales are

decided, it seems reasonable to conclude that the principles discussed earlier would control.²³⁵

VII. CONCLUSION

It is readily apparent that the use of judicial precedent developed in antifraud cases to determine the scope of the 1933 Act's registration requirements produces a less than satisfactory analysis.²³⁶ The absence of a Supreme Court decision in this area of the law adds to the uncertainty.²³⁷ Moreover, the maxim that the 1933 and 1934 Acts are "in pari materia and must be construed together to make a consistent whole"²³⁸ provides little guidance for the resolution of an issue involving such complex and diverse interests.²³⁹

made *outside the United States exclusively to foreign investors*, it is questionable whether subject matter jurisdiction exists. See notes 226-32 and accompanying text *supra*.

235. For example, the issue may arise as to the effect of a foreign distribution of securities on a prior private placement. Specifically, assume that an American corporation issued shares to its foreign subsidiary in a transaction meeting all the requirements of the SEC's rule on private placements, 17 C.F.R. § 230.146 (1978). Assume, further, that it was clear that the foreign subsidiary planned to distribute the securities *exclusively* to foreign investors in the foreign country, shortly after purchase. Does the subsidiary's intended distribution invalidate the private placement since the purchaser took with a view towards distribution? It appears as though the SEC should answer the question in the negative if it is to be consistent with its announced policies. See *In re Morris Mac Schwebel*, 40 S.E.C. 347 (1960); Release 4708, *supra* note 10, ¶¶ 1361-1362, at 2123-25; Sulpetro Int'l, Ltd. (Aug. 25, 1977). Moreover, the judicial decisions suggest a like result. See *SEC v. North Am. Research & Dev. Corp.*, 280 F. Supp. 106, 123 (S.D.N.Y. 1968), *aff'd in part and vacated in part on other grounds*, 424 F.2d 63 (2d Cir. 1970); *SEC v. Mono-Kearsarge Consol. Mining Co.*, 167 F. Supp. 248, 256-59 (D. Utah 1958). See also notes 226-32 and accompanying text *supra*.

236. See notes 209-10, 221 & 225 and accompanying text *supra*.

237. The only reference to the extraterritorial reach of the securities laws by the Supreme Court was in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). In *Scherk*, the Court held that in an international transaction, an agreement to arbitrate contract disputes before the International Chamber of Commerce precluded a court from hearing an antifraud claim under the 1934 Act. *Id.* at 519-20. Although the majority did not discuss the extraterritoriality issue, Justice Douglas writing for four dissenters, cited *inter alia*, *Leasco Data Processing Equip. Co. v. Maxwell*, 468 F.2d 1326, 1334-39 (2d Cir. 1972), for the proposition that "the 1934 Act . . . applies when foreign defendants have defrauded American investors, particularly when . . . they have profited by virtue of proscribed conduct within our boundaries." 417 U.S. at 529-30. (Douglas, J., dissenting).

238. *Rosenberg v. Globe Aircraft Corp.*, 80 F. Supp. 123, 124 (E.D. Pa. 1948).

239. See THIRD DRAFT, *supra* note 187, § 1604, Comment 10(a), at 170 (extensive extraterritoriality might damage country's trade position); Bator, *Offerings Of Foreign Securities In The United States*, in SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION 309, 324-26 (1975); Williams, *supra* note 4, at 349-50; Karmel, *supra* note 4, at 670-71, 704-10; *Reach of Rule 10b-5*, *supra* note 4, at 1392-403.

Among the most frequently cited interests in the aforementioned commentaries are: 1) the United States interest in protecting its investors and securities markets; 2) the United States monetary policy of encouraging foreign investment in American securities in order to assist in the country's balance of payments problem; 3) a foreign nation's interest in its secrecy statutes which may be in conflict with United States disclosure laws; 4) a foreign nation's interest in developing its own regulatory system; 5) the international interest in uniformity; 6) the international communities' interest in the free flow of capital; and 7) the need for comity among nations. As can be seen, great conflict may arise from these varying interests.

Although courts to date have not distinguished between the extraterritorial reach of various provisions of the federal securities laws,²⁴⁰ it is submitted that such a distinction would be appropriate where the sole issue is failure to register.²⁴¹ Unlike cases involving fraudulent conduct, in which an expansive extraterritorial application of the statute is perhaps more easily justified,²⁴² liability for failure to register is essentially not based upon fault.²⁴³ As a result, application of the registration requirements to conduct in foreign countries is tantamount to an imposition of American notions regarding the relative merits of disclosure,²⁴⁴ a process the effectiveness of which is subject to criticism even by those in this country.²⁴⁵ It is therefore submitted that the courts should not blindly extend a statute which would produce such results without a clear indication from Congress.²⁴⁶ While the SEC's interpretation of the statute is traditionally accorded great weight,²⁴⁷ the ultimate resolution of the issue must be determined by examining Congress' intent.²⁴⁸

Moreover, as a matter of statutory construction, the fact that Congress may have intended a broad reach where fraudulent conduct was involved is not necessarily dispositive of its intent with respect to the registration provisions. Indeed, the fact that the antifraud provisions apply even in the absence of a required registration would appear to indicate that these provisions should have a more broad application.²⁴⁹ Furthermore, where the offer and sale of the securities take place in a foreign country, it is questionable whether Congress intended the registration provisions to apply. As Professor Loss has noted,

it [is] . . . possible . . . to distinguish between the registration and fraud provisions in [the context of extraterritorial application] on

240. See notes 87 & 198 and accompanying text *supra*.

241. See THIRD DRAFT, *supra* note 187, § 1604, Comment (4), at 167; Karmel, *supra* note 4, at 670, 695. See also notes 194-98 and accompanying text *supra*.

242. See Karmel, *supra* note 4, at 694.

243. See *Lynn v. Caraway*, 252 F. Supp. 858, 862-63 (W.D. La. 1966), *aff'd* 379 F.2d 943 (5th Cir. 1967), *cert. denied*, 393 U.S. 951 (1968).

244. The SEC has indicated that "[t]he legislative history of the Securities Act of 1933 indicates that the main concern of Congress was to provide for full and fair disclosure in connection with the offer and sale of securities." SEC Securities Act Release No. 5487, 39 FED. REG. 15,261, *reprinted in* 1 FED. SEC. L. REP. (CCH) ¶ 2710 (April 23, 1974).

245. See, e.g., Mendelson, *Economics and the Assessment of Disclosure Requirements*, 1 J. COMP. CORP. L. & SEC. REG. 49 (1978). See also Bator, *supra* note 239, at 324-26.

246. There is little doubt that disclosure systems in foreign countries are not nearly as detailed or rigorous as that in the United States. See, e.g., Bator, *supra* note 239, at 325; Bodolus, *supra* note 1, at 109-13; Widmer, *The U.S. Securities Law—Banking Law of the World?*, 1 J. COMP. CORP. L. & SEC. REG. 39 (1978). See generally Thorpe, *The Sale of U.S. Securities In Japan*, 29 BUS. LAW. 411 (1974). Moreover, some foreigners are not pleased by the SEC's activism in this area. See Widmer, *supra*. In addition, at least one commentator has questioned the United States policy of imposing its disclosure system on foreign issuers. See Bator, *supra* note 239, at 324-26 (1975).

247. See *SEC v. Timetrust, Inc.*, 28 F. Supp. 34, 39 (N.D. Cal. 1939).

248. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

249. See text accompanying note 19 *supra*.

the ground that it is easier to ascribe to Congress a purpose to prohibit the use of the United States as a base from which to defraud her neighbors than an intention that every Canadian buyer receive a statutory prospectus even though no offers are made in the United States.²⁵⁰

Finally, it also seems questionable whether the registration requirements should be extended to protect Americans living abroad.²⁵¹ While current judicial decisions suggest that the registration requirements extend, at a minimum, to all nonexempt offers and sales made in the United States and to those made to Americans either visiting or living abroad,²⁵² it is submitted that the jurisdictional reach of section 5 should be more narrowly defined. By focusing on the purpose of section 5 and the problems associated with extending the reach of that provision,²⁵³ it seems appropriate that registration should only be required when distributions are made in the United States. It is suggested that the expansive definition of underwriter contained in the securities laws²⁵⁴ will adequately cover those distributions in the United States attempted to be concealed behind the "foreign distribution" label.²⁵⁵

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250. 1 L. LOSS, *SECURITIES REGULATION* 369 (2d ed. 1962). Moreover, it is arguable that such an exclusive foreign distribution would be exempt from registration as a private offering. *See id.* *See also* notes 170-77 & 232 and accompanying text *supra*.

251. *See* note 130 and accompanying text *supra*. It is interesting to note that the Code makes no reference to the nationality of the purchaser in exempting offerings initiated in the United States but occurring abroad. *See* CODE, *supra* note 179, § 1905(b)(1). Moreover, international law principles do not authorize a state to assume jurisdiction over an alien simply on the "ground that the [alien's] conduct affects one of its nationals." *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 30(2) (1965). It is therefore submitted that it is questionable whether a foreign issuer should be required to register an offering made to American nationals abroad absent a clear indication from the Congress that it wanted to go beyond the principles of international law. *See* *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972).

252. *See* notes 215-25 and accompanying text *supra*.

253. *See* notes 240-51 and accompanying text *supra*.

254. 15 U.S.C. § 77b(11) (1976).

255. *See, e.g., SEC v. North Am. Research & Dev. Corp.*, 280 F. Supp. 106 (S.D.N.Y. 1968), *aff'd in part and vacated in part on other grounds*, 424 F.2d 63 (2d Cir. 1970); 4 L. LOSS, *SECURITIES REGULATION* 2408 (2d ed. 1969). *See also* Hopkins, *supra* note 4, at 308.